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(2021)06ILR A1
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.04.2021

BEFORE

THE HON'BLE SIDDHARTH, J.

Crl. Misc. Ist Anticipatory Bail Application No 2110 of 2021
(u/s 438 Cr.P.C.)

Shivam ...Applicant
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
Ajay Sengar

Counsel for the Opp. Parties:
G.A., Lakshman Singh

(a) Criminal Law - Anticipatory Bail – Code of Criminal Precedure,1973 - Section 438 - "appropriate cases" - the appropriate cases wherein anticipatory bail can be granted are those where charge-sheet submitted by the Investigating Officer and process issued by the Court after taking cognizance under Section 204 Cr.P.C. can be quashed by the High Court in exercise of its jurisdiction under Section 482 Cr.P.C. and also some more cases. (Para 40)

The anticipatory bail is given only where there is an apprehension of arrest. The apprehension of arrest is possible only when the person is being haunted by the police or other authority. In many of the cases such haunting of a person is possible only after the issuance of the warrant of a arrest after filing of the charge-sheet or after the steps under Section 204 of the Code are taken. At this juncture a person cannot move the Courts under Section 437 or under Section 439 because he is not in custody. But he can very well approach the High Court or the Court of Session under Section 438 for an appropriate order. Filling of an application under Section 438 itself does not mean that the applicant will be entitled to an order thereof. It is only after examining the each case cautiously and carefully inasmuch as it is an order converting a non-bailable offence into a bailable one and protecting a person for some time from going to thr custody after the arrest. (Para 13)

Application Rejected. (E-8)

List of Cases cited:-

1. Govind Mishra @ Chhotu Vs St. of U.P. Criminal Misc. Anticipatory Bail Application U/S 438 Cr.P.C. No. 8072 of 2020

2. Gorige Pentaiah Vs St. of A.P. & ors. 2009 Cri. L.J. 350

3. Adil Vs St. of U.P. Criminal Misc. Anticipatory Bail Application U/S 438 Cr.P.C. No. 8285 of 2020

4. Sushila Aggarwal Vs State (NCT of Delhi) 2020 SCC Online SC 98

5. St. of Bihar Vs P.P. Sharma 1992 Supp (1) SCC 222

6. Babubhai Vs St. of Guj. (2010) 12 SCC 254: (2011) 1 SCC (Cri) 336

7. Inay Tyagi Vs Irshad Ali (2013) 5 SCC 762

8. Amitbhai Anilchnadra Shah Vs CBI (2013) 6 SCC 348: (2014) 1 SCC (Cri) 309

9. Manohar Lal Sharma Vs Principal Secy., (2014) 2 SCC 532: (2014) 4 SCC (Cri) 1

10. Dinubhai Boghabhai Solanki Vs St. of Guj. (2014) 4 SCC 626: (2014) 2 SCC (Cri) 384

11. Rajiv Singh Vs St. of Bihar (2015) 16 SCC 369

12. Suresh Chandra Jana Vs St. of W.B., (2017) 16 SCC 466

13. Nirmal Singh Kahlon Vs St. of Punjab (2009) 1 SCC 441: (20019) 1 SCC (Cri) 523

14. Azija Begum Vs St. of Mah. (2012) 3 SCC 126

(Delivered by Hon'ble Siddharth, J.)

1) Counter affidavit filed by learned A.G.A. in the Court today is taken on record.

2) Heard learned counsel for the applicant and learned A.G.A. for the State.

3) **Order on Criminal Misc. Exemption Application**

This exemption application is allowed.

4) **Order on Criminal Misc. Anticipatory Bail Application**

The instant anticipatory bail application has been filed with a prayer to grant an anticipatory bail to the applicant, **Shivam, in Case Crime No. 16 of 2020, under Sections- 323, 504, 506 I.P.C. & Section 3(1)(r)(s) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, Police Station- Churkhi, District- Jalaun** at post-cognizance stage.

5) 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.

6) The allegation in the F.I.R is that the informant is a newsman. He noticed that crowd has collected on the bus stand. He requested the policemen in Dial 112 vehicle standing nearby to remove the crowd. The crowd was removed. Thereafter, some dabanggs of the locality namely Prashant, son of Shyam Kishore Tiwari and Shibbi @ Shivam Tiwari (applicant), son of Mahant Tiwari, came and abused the informant by using the word "dhed chamaar" etc., and also abused him in the name of his mother and sister because they were aware of the caste of the applicant. They threatened him that if he will indulge in journalism, he would be killed.

7) Learned counsel for the applicant has submitted that the applicant has been falsely implicated in this case. He has next submitted that no specific role was assigned to the applicant in the F.I.R. Without collecting any evidence against the applicant, charge-sheet has been submitted against him on 12.05.2020 and cognizance has been taken thereon on 20.11.2020. There is no role assigned to him regarding intimidation or insult of the informant in public view and therefore, the implication of the applicant for offence u/s 3(1)(r)(s) of the S.C./S.T. Act, is without any basis. He has further submitted that from the material collected by the Investigating Officer, it is not proved that the informant was abused by the applicant and co-accused, knowing that he belongs to scheduled caste. He has no criminal history to his credit. The applicant has definite apprehension that he may be arrested by the police any time. Learned counsel for the applicant has relied upon the judgement of the Apex Court in the case of **Gorige Pentaiah v. State of A.P. & Ors., 2009 Cri.L.J. 350**, which is a case regarding Section 3(1)(x) of S.C./S.T. Act and not Section 3(1)(r)(s) of S.C./S.T. Act. He has assured that the applicant will cooperate with the trial and may be enlarged on anticipatory bail.

8) 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, he 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.

9) This Court in the case of **Adil Vs. State of U.P.** passed in Criminal Misc. Anticipatory Bail Application U/S 438 Cr.P.C. No. 8285 of 2020 dated 08.12.2020, relying upon the judgement of the Hon'ble Supreme Court in the case of **Sushila Aggarwal vs. State (NCT of Delhi)- 2020 SCC Online SC 98** held that anticipatory bail can be granted to an accused even after submission of charge-sheet in "appropriate cases". On the basis of the aforesaid judgement of this Court in the case of **Adil (supra)**, large number of anticipatory bail applications are being filed before this Court on the premise that after submission of charge-sheet, anticipatory bail can be granted to every accused and the counsels are trying to justify filing of such applications on the basis of number of submissions arguing that it is an "appropriate case" for grant of anticipatory bail even after submission of charge-sheet.

10) In the case of **Adil (supra)**, this Court had not defined what are "appropriate cases" wherein anticipatory bail can be granted to an accused even after charge-sheet has been filed by the Investigating Officer of police against him before the competent Court.

11) It is true that charge-sheet in a case is generally filed after finding out a prima facie case. Similarly, in a complaint case the learned Magistrate after examining the witnesses and perusing the documents produced, issues processes like warrant of arrest. In both these occasions cognizance is taken and thereafter, processes are issued indicating that the learned Magistrate was prima facie satisfied from the materials on record as regards the commission of the offence and thereafter issues appropriate process for apprehension of the accused person. It is to be noted that this Court is not considering a stage when an application under Section 438 is to be filed since it has been decided in the case of **Adil (supra**). There are cases in which charge-sheets have been filed by the police after investigation without the knowledge of the accused persons showing them as absconders. Such an accused person after the submission of the charge-sheet and on issuance of a warrant of arrest gets the knowledge of the case and then, only for the first time, he has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence. In a case of this nature, it cannot be thought of that the person who was unaware of the case should be arrested and kept in custody of the police or of the Court for getting an opportunity of filing an application under Section 437 or under Section 438 of the Code. It is desirable to keep in view the observations of the Law Commission and also of the Apex Court as regards the necessity of passing an order under Section 438 in these days when political vendetta and other factors rule the realm of police investigation of a case. This Court is not unmindful of a situation that in a complaint case a process can be issued relying on the statements of the witnesses examined under Section 200. But the person against whom those statements were made might be falsely implicated to satisfy political or personal vengeance and may be without his knowledge.

12) It is a settled principle of law that a man cannot be stated to be guilty unless his guilt is proved after adducing reliable

evidence. Sending a person to custody after finding his guilt is a rule. But before finding the accused guilty, it is not always possible or permissible to conclude on the basis of the charge-sheet or on the basis of the process issued under Section 204 in a complaint case that custody of that person is necessary. The word "bail" has not been defined in the Code, the literal meaning of the word "bail" is to set free or liberate a person on security being given of his appearance. In Law Lexicon, the word "bail" is defined "to set at liberty a person arrested or imprison on security being taken for his appearance". So the accepted meaning of "bail" is to release of a person from legal custody.

13) Under Section 438, the question posed before the High Court or the Court of Session is whether a person if arrested on an accusation of having committed a non-bailable offence, can be released on bail. The apprehension of such an arrest is possible only when the person is being haunted by the police or other authority. In many of the cases such haunting of a person is possible only after the issuance of the warrant of arrest after the filing of the charge-sheet or after the steps under Section 204 of the Code are taken. At this juncture a person cannot move the Courts under Section 437 or under Section 439 because he is not in custody. But he can very well approach the High Court or the Court of Session under Section 438 for an appropriate order. The High Court or the Court of Session in its turn is competent to examine the case of the person and his suitability to be enlarged on bail after the arrest and then only an order under Section 438 is passed. So filing of an application under Section 438 itself does not mean that the applicant will be entitled to an order thereof. It is already settled that an order under Section 438 can be passed after examining each case cautiously and carefully inasmuch as it is an order converting a non-bailable offence into a bailable one and protecting a person for some time from going to the custody after the arrest. This precisely is the issue in the present case which is required to be answered. What are the "appropriate cases" wherein the anticipatory bail can be filed under Section 438 after the filing of the charge-sheet or after the issuance of a process under Section 204 of the Code or after the issue of warrant of arrest in a complaint case.

14) Before proceeding further to decide the issue in hand, the basis of charge-sheet and the manner of investigation by police in a case involving cognizable offences needs consideration.

15) Investigation and chargesheet form the genesis of the Criminal Trial. Chargesheet is the outcome of investigation. Under Section 157 of the Code of Criminal Procedure, the procedure of investigation in criminal cases has been incorporated. It requires the intimation of information to the police officer on the commission of a crime. The investigation includes all the procedures which are done by the police officer under the Code for the collection of evidence. The police on registration of FIR shall upon perusal of the facts of the case decide the line of investigation i.e whether there is circumstantial evidence or eyewitnesses. Circumstantial evidence is the something which is a chain of circumstances that lead to the crime for example previous animosity, threats, last seen theory. It is basically connection of various circumstances to the crime. On the other hand, eyewitnesses are those who have seen the incident take place.

16) The police officer who is pursuing the investigation is empowered to require the attendance of the witnesses. The

witnesses shall be such who are acquainted with the facts and circumstances of the case. The powers have been conferred under Section 160 of the Code. The provisions of Section 160 of the Code explicitly mention that no male below fifteen years or a woman shall be called to attend at any other place than the place where she resides.

17) The non-compliance of summons under Section 160 of the Code is punishable under Section 174 of the Code. The person who is required to appear when served summons does not do so shall be liable to simple imprisonment up to one month or with a fine up to INR 500 or both. The section only requires the attendance of the witnesses and furnishing of relevant information about them. The police officer cannot insist upon the witnesses for the production of documents before him. The order which requires the attendance of a person needs to be in written form.

18) The most crucial part of the investigation lies in the examination of witnesses. The statements made by them can hold a person guilty. The police officer who is investigating the case has been empowered to conduct witness examination. The witnesses are bound to answer the questions which are related to the case truly. Section 161 lays down the procedure for the examination of witnesses by the police.

19) The investigating officer shall examine the persons who are acquainted with the facts of the case. It is the duty of the investigating officer to record the statements of the eyewitnesses without any delay. After examining the witnesses, it is required by the police officer to write down the statement made by the witness.There should be no delay on the part of the police officer investigating the case in examining the witnesses. In the event of a delay of the examination of the witness, the onus lies on the investigating officer for explaining the reasons for the delay.

20) When the delay has been properly explained, it does not have any adverse impact upon the probable value of a particular witness. The police officer while examining the witnesses is not bound to reduce the statements made into writing. It is preferred that the statements should be written or the substance of the whole examination should be written down at least. The recorded statements are required to be noted down in the case diary maintained under Section 172 of the Code.

21) A police officer or the investigating officer has been empowered under section 165 of the Code to search the premises whenever he feels necessary or has reasonable grounds to believe the same. The investigating officer or the officer-in-charge conducts the search when he believes that there are sufficient or reasonable grounds to pursue the same. The search is conducted when there is an absolute necessity for the same. Section 93(1) of the Code of Criminal Procedure provides for the grounds under which a warrant for search shall be issued. Moreover, the search has to be recorded in the diary otherwise it becomes illegal.

22) The investigating officer would go to the locality where the offence was committed and get two people called the "Panchas'. The evidence given by the Panchas is of paramount importance. They sign a document called the Panchnama which contains the evidence collected out of the search. It is signed by them which

validates the search and the procedure adopted during the investigation.

23) Panchnama has not been defined anywhere in the law. However, it is a document which holds great value in criminal cases. The Panchnama states things which were found at a particular place and at a particular time. After this, a memorandum of the search is prepared by the investigating officer or the officer-in-charge. It needs to be submitted to the Magistrate. The police officer-in-charge or the investigating officer who has a valid warrant is to be allowed to conduct the search of a place. Force may be used if he is not allowed to do so. The search is not just only of the premises but also of a person. If it is a female, a female officer shall search her with utmost decency. The search of the closed place or of a person has to be made before two respectable persons of the society. These respectable persons are known as the "Panchas'. They need to sign the document validating the search. However, the Panchas need not necessarily be called as witnesses.

24) Under Section 47 of the Code, the search of a place can be conducted by the police when they have to arrest a person. The police can break in and enter if they are not being allowed in the place. There is also an allowance for no-knock break-in to take place: this is done to take the person by surprise. The basic objective of conducting a search is to find evidence which may help in solving the case.

25) Section 91 of the Code of Criminal Procedure states that whenever a Court or the officer-in-charge of a police station feels that a document or some other thing is necessary for the purpose of the investigation, such Court may issue summon or the officer may in writing, order the person in whose possession the document is to be produced. The document shall be produced at the date and time specified in the summons served to the person. This section does not apply to a person who is accused and on trial.

26) The Court cannot issue a summons for the production of a document or a thing by the accused. This is because it will become self-incrimination under Article 20(3) of the Constitution of India.

27) Under section 92 of the Code, if a document or other thing or a parcel is in the custody of a postal or telegraph authority, and the Magistrate whether Judicial or Executive, any of the Courts wanted that that document for the purpose of investigation, such Magistrate or the Court may order the authority to produce the document before them.

28) Section 173 of the Code requires the investigating officer to file a report before the Magistrate after the collection of evidence and examination of witnesses are done with. This section requires that each and every investigation shall be completed without any unnecessary delay.

29) The report under Section 169 of the Code can be referred to as the Closure Report. Closure report is the one in which it is stated that there is not enough evidence to prove that the offence has been committed by the accused. Once the closure report is filed before the Magistrate, he may accept and the report the case as closed, direct a further investigation into the case, issue a notice to the first informant as he is the only person who can challenge the report or he may directly reject the closure and take cognizance of the case.

30) A charge sheet is a final report prepared by the investigation or law enforcement agencies for proving the accusation of a crime in a criminal court of law. The report is basically submitted by the police officer in order to prove that the accused is connected with any offence or has committed any offence punishable under any penal statute having effect in India. The report entails and embodies all the stringent records right from the commencement of investigation procedure of lodging an FIR to till the completion of investigation and preparation of final report. Section 173 of the Code of Criminal Procedure, 1973 provides for report of the police officer. Filing of the Charge-Sheet indicates the end of investigation.

31) The purpose of a charge-sheet is to notify a person of criminal charges being issued against them. After the charge-sheet is filed, the person against whom the charge-sheet has been filed comes to be known as an accused. The filing of charge-sheet with the magistrate indicates commencement of criminal proceedings.

32) The U.P. Police Regulation 107 and 108 detail the procedure required to be followed by the Investigating Officer as follows :-

107. An Investigating Officer is not to regard himself as a mere clerk for the recording of statements. It is his duty to observe and to infer. In every case, he must use his own exprt observations of the scene of the offence and of the general circumstances to check the evidence of witnesses, and in cases in which the culprits are unknown to determine the direction in which he shall look for them. He must study the methods of local offenders who are known to the police with a view to recognizing their handiwork, and he must be on his guard against accepting the suspicions of witness and complaints when they conflict with obvious inferences from facts. He must remember that it his duty to find out the truth and not merely to obtain convictions. He must not prematurely commit himself to any view of the facts for or against any person and though he need not go out of his way to hunt up evidence for the defence in a case in which he has satisfactory grounds for believing that an accused person is guilty, he must always give accused perons an opportunity of producting defence evidence before him, and must consider such evidence carefully if produced. Burglary investigations should be conducted in accordance with the special orders on the subject.

108. The first step of the Investigating Officer should be to note in the case diary prescribed by Section 172 of the Code of Criminal Procedure the time and place at which he has received the information on which he acts and to make in the diary a copy of the first information report. When beginning his investigation, he must note in the diary the time and place at which he begins. He should then inspect the scene of the alleged offence and question the complainant and any other person who may be able to throw light on the circumstances. At an early stage of the investigation, he should consult the village crime note-book to learn of any matter recorded there which may have a bearing on the case.

33) A perusal of the aforesaid regulations shows that for the Investigating Officer, the accused and the complainant are equal at the time of conducting investigation. He has to consider the case of both the parties and thereafter, arrive at a

fair conclusion regarding the investigation into the allegations made against the accused. He is not required to simply prove that the allegations in the F.I.R are correct and should necessarily collect evidence to implicate the accused, justifying his implication.

34) What is fair investigation has been considered by the Hon'ble Supreme Court in number of judgements, considered hereinbelow :-

1) **State of Bihar v. P.P. Sharma, 1992 Supp (1) SCC 222, at page 258 :**

48. From this perspective, the function of the judiciary in the course of investigation by the police should be complementary and full freedom should be accorded to the investigator to collect the evidence connecting the chain of events leading to the discovery of the truth, viz., the proof of the commission of the crime,. Often individual liberty of a witness or an accused person are involved and inconvenience is inescapable and unavoidable. The investigating officer would conduct indepth investigation to discover truth while keeping in view the individual liberty with due observance of law. At the same time he has a duty to enforce criminal law as an integral process. No criminal justice system deserves respect if its wheels are turned by ignorance. It is never his business to fabricate the evidence to connect the suspect with the commission of the crime. Trustworthiness of the police is the primary insurance. Reputation for investigative competence and individual honesty of the investigator are necessary to enthuse public confidence. Total support of the public also is necessary.

2) **Babubhai v. State of Gujarat, (2010) 12 SCC 254 : (2011) 1 SCC (Cri) 336, at page 268 :**

32. The investigation into a criminal offence must be free from objectionable features or infirmities which may legitimately lead to a grievance on the part of the accused that investigation was unfair and carried out with an ulterior motive. It is also the duty of the Investigating Officer to conduct the investigation avoiding any kind of mischief and harassment to any of the accused. The Investigating Officer should be fair and conscious so as to rule out any possibility of fabrication of evidence and his impartial conduct must dispel any suspicion as to its genuineness. The Investigating Officer "is not to bolster up a prosecution case with such evidence as may enable the court to record conviction but to bring out the real unvarnished truth". (Vide R.P. Kapur Vs. State of Punjab AIR 1960 SC 866; Jamuna Chaudhary & Ors. Vs. State of Bihar AIR 1974 SC 1822; and Mahmood Vs. State of U.P. AIR 1976 SC 69).

3) **Vinay Tyagi v. Irshad Ali, (2013) 5 SCC 762, at page 792 :**

48. What ultimately is the aim or significance of the expression "fair and proper investigation' in criminal jurisprudence? It has a twin purpose. Firstly, the investigation must be unbiased, honest, just and in accordance with law. Secondly, the entire emphasis on a fair investigation has to be to bring out the truth of the case before the court of competent jurisdiction. Once these twin paradigms of fair investigation are satisfied, there will be the least requirement for the court of law to interfere with the investigation, much less quash the same, or transfer it to another

agency. Bringing out the truth by fair and investigative means in accordance with law would essentially repel the very basis of an unfair, tainted investigation or cases of false implication. Thus, it is inevitable for a court of law to pass a specific order as to the fate of the investigation, which in its opinion is unfair, tainted and in violation of the settled principles of investigative canons.

4) **Amitbhai Anilchandra Shah v. CBI, (2013) 6 SCC 348 : (2014) 1 SCC (Cri) 309, at page 383 :**

58.9. Administering criminal justice is a two-end process, where guarding the ensured rights of the accused under Constitution is as imperative as ensuring justice to the victim. It is definitely a daunting task but equally a compelling responsibility vested on the court of law to protect and shield the rights of both. Thus, a just balance between the fundamental rights of the accused guaranteed under the Constitution and the expansive power of the police to investigate a cognizable offence has to be struck by the court. Accordingly, the sweeping power of investigation does not warrant subjecting a citizen each time to fresh investigation by the police in respect of the same incident, giving rise to one or more cognizable offences. As a consequence, in our view this is a fit case for quashing the second F.I.R to meet the ends of justice.

58.10. The investigating officers are the kingpins in the criminal justice system. Their reliable investigation is the leading step towards affirming complete justice to the victims of the case. Hence they are bestowed with dual duties i.e. to investigate the matter exhaustively and subsequently collect reliable evidences to establish the same.

5) **Manohar Lal Sharma v. Prinicipal Secy., (2014) 2 SCC 532 : (2014) 4 SCC (Cri) 1, at page 553** :

26. One of the responsibilities of the police is protection of life, liberty and property of citizens. The investigation of offences is one of the important duties the police has to perform. The aim of investigation is ultimately to search for truth and bring the offender to book.

27. Section 2(h) of the Code of Criminal Procedure (for short "the Code") defines investigation to include all the proceedings under the Code for collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorized by the Magistrate in this behalf.

28. In **H.N. Rishbud**, this Court explained that the investigation generally consists of the following steps : (AIR p. 201, para 5)

(1) Proceeding to the spot;

(2) ascertainment of the facts and circumstances of the case; (3) discovery and arrest of the suspected offender;

(4) collection of evidence relating to the commission of the offence which may consist of the examination of :

(a) various persons (including the accused) and the reduction of statement into writing, if the officer thinks fit;

(b) the search of places and seizure of things, considered necessary for the investigation and to be produced at the trial;

(5) formation of the opinion as to whether on the materials collected, there is a case to place the accused before a Magistrate for trial, if so, take the necessary

steps for the same for filing necessary charge-sheet under Section 173 Cr.P.C.

6) **Dinubhai Boghabhai Solanki v. State of Gujarat, (2014) 4 SCC 626 : (2014) 2 SCC (Cri) 384, at page 643** :

48. Undoubtedly, the essence of criminal justice system is to reach the truth. The underlying principle is that whilst the guilty must not escape punishment; no innocent person shall be punished unless the guilt of the suspect/accused is established in accordance with law. All suspects/accused are presumed to be innocent till their guilt is proved beyond reasonable doubt in a trial conducted according to the procedure prescribed under law. Fair, unbiased and transparent investigation is a sine quo non for protecting the accused. Being dissatisfied with the manner in which the investigation was being conducted, the father of the victim filed the petition seeking an impartial investigation.

7) **Rajiv Singh v. State of Bihar, (2015) 16 SCC 369, at page 397** :-

79. The investigating agency as the empowered mechanism of the law enforcing institution of the State is entrusted with the solemn responsibility of securing the safety and security of the citizens and in the process, act as the protector of human rights. The police force with the power and resources at its disposal is a pivotal cog in the constitutional wheel of the democratic polity to guarantee the sustenance of an orderly society. It is usually the first refuge of one in distress and violated in his legal rights to seek redress. The police force, thus is bestowed with a sacrosanct duty and is undisputedly required to be impartial, committed and relentless in their operations to unravel the truth and in the case of a crime committed, make the offender subject to the process of law. The investigating agency, thus in the case of a probe into any offence has to maintain a delicate balance of the competing rights of the offenders and the victim as constitutionally ordained but by no means can be casual, incautious, indiscreet in its approach and application. A devoted and resolved intervention of the police force is thus an assurance against increasingly pernicious trend of escalating crimes and outrages of law in the current actuality.

80. As a criminal offence is a crime against the society, the investigating agency has a sanctified, legal and social obligation to exhaust all its resources, experience and expertise to ferret out the truth and bring the culprit to book. The manifest defects in the investigation in the case demonstrate an inexcusable failure of the authorities concerned to abide by this paramount imperative.

81. This Court, amongst others, in **Amitbhai Anilchandra Shah vs. Central Bureau of Investigation and another (2013) 6 SCC 348**, while underlining the essentiality of a fair, in-depth and fructuous investigation had observed that investigating officers are the kingpins in the criminal justice system and reliable investigation is a leading step towards affirming complete justice to the victims of the case. It was ruled that administering criminal justice is a two-end process, where guarding the ensured rights of the accused under the Constitution is as imperative as ensuring justice to the victim. It was held that the daunting task, though a compelling responsibility, is vested on the court of law to protect and shield the rights of both. That a just balance between the fundamental rights of the accused guaranteed under the

Constitution and the expansive power of the police to investigate a cognizable offence has to be struck by the Court was emphatically underlined. We are left appalled by the incomprehensible omissions of the investigating agency in the instant case and we would expect and require that the authorities in-charge of ensuring fair, competent and effective investigation of criminal offences in particular would take note of this serious concern of the Court and unfailingly take necessary remedial steps so much so that these observations need not be reiterated in future entailing punitive consequences.

8) **Suresh Chandra Jana v. State of W.B., (2017) 16 SCC 466, at page 480** :-

34. The last aspect is regarding the defective investigation and prosecution. If a negligent investigation or omissions or lapses, due to perfunctory investigation, are not effectively rectified, the faith and confidence of the people in the law enforcing agency would be shaken. Therefore the police have to demonstrate utmost diligence, seriousness and promptness. [refer Ram Bihari Yadav v. State of Bihar & Ors., (1998) 4 SCC 517].

35. The basic requirement that a trial must be fair is crucial for any civilized criminal justice system. It is essential in a Reportable society which recognizes human rights and is based on values such as freedoms, the rule of law, democracy and openness. The whole purpose of the trial is to convict the guilty and at the same time to protect the innocent. In this process courts should always be in search of the truth and should come to the conclusion, based on the facts and circumstances of each case, without defeating the very purpose of justice.

35) The Hon'ble Supreme Court has held in number of cases that fair investigation, which precedes filing of charge-sheet, is a fundamental right under Article 21 of the Constitution of India. Therefore, it must be fair, transparent and judicious. A tainted and biased investigation leads to filing of a charge-sheet which is infact based on no investigation and therefore, the charge-sheet filed in pursuance of such an investigation cannot be held to be legal and in accordance with law. Some of such observations are as follows :-

1) **Nirmal Singh Kahlon v. State of Punjab, (2009) 1 SCC 441 : (2009) 1 SCC (Cri) 523, at page 455 :**

28. An accused is entitled to a fair investigation. Fair investigation and fair trial are concomitant to preservation of fundamental right of an accused under Article 21 of the Constitution of India. But the State has a larger obligation i.e. to maintain law and order, public order and preservation of peace and harmony in the society. A victim of a crime, thus, is equally entitled to a fair investigation. When serious allegations were made against a former Minister of the State, save and except the cases of political revenge amounting to malice, it is for the State to entrust one or the other agency for the purpose of investigating into the matter. The State for achieving the said object at any point of time may consider handing over of investigation to any other agency including a central agency which has acquired specialization in such cases.

2) **Babubhai v. State of Gujarat, (2010) 12 SCC 254 : (2011) 1 SCC (Cri) 336, at page 272 :**

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.

3) **Azija Begum v. State of Maharashtra, (2012) 3 SCC 126, at page 128 :**

12. In the facts and circumstances of this case, we find that every citizen of this country has a right to get his or her complaint properly investigated. The legal framework of investigation provided under our laws cannot be made selectively available only to some persons and denied to others. This is a question of equal protection of laws and is covered by the guarantee under Article 14 of the Constitution.

13. The issue is akin to ensuring an equal access to justice. A fair and proper investigation is always conducive to the ends of justice and for establishing rule of law and maintaining proper balance in law and order. These are very vital issues in a democratic set up which must be taken care of by the Courts.

36) This country has inherited the present police system from the British Government. The main objective of British rule was to maintain status quo by using the police force as effective weapon to put down any challenge to its authority by iron hand. The police had to take repressive measures on account of the directions of the British Government. The investigation was accordingly carried out keeping in view the direction of the government and their object of ruling this country. Charge-sheets were submitted accordingly which were not the result of free and fair investigation. The fundamental rights of the people of the country were not in existence and the Criminal Procedure Code was designed in a manner which was not in the interest of the people of this country before independence.

37) After India became independent, it became a welfare state from the police state of the Britishers. The legislations which were framed after independence were in conformity with the fundamental rights of the people of this country. In the welfare state, the role of the police became more difficult in view of deteriorating law and order situation, communal riots, political turmoil, student unrest, terrorist activities, increase in white-collar crimes, etc. The police force, in addition to the aforesaid new challenges, came under stress and strain. Long hours of duty in connection with law and order situation, V.I.P duty, etc., left the police with lesser time to investigate the cases. Under the pressure of work, they started mechanical investigation into the crimes given to them for free and fair investigation. The Investigating Officer is subjected to pressure by the influential persons of society to give report as per their command. The influence of money in conducting investigation is quite evident and it is a very big hurdle in the free and fair investigation of a case. It was suggested by number of Law Commission Reports that the investigation wing of the

police should be separated from the law and order wing but it has not materialized as yet.

38) Therefore, it is clear that the Court has to be cautious in considering the anticipatory bail applications filed by the accused after submission of charge-sheet. There are number of impediments in the way of Investigating Officer in submission of charge-sheet after free and fair investigation as considered hereinabove.

39) Right to liberty is sacrosanct and guaranteed under Article 21 of the Constitution of India. Under Article 14 of the Constitution of India, there is equal protection of law to everyone, informant/complainant and accused, alike. During investigation stage or during trial stage, "presumption of innocence of accused" is intact and it is so till he is convicted either under Section 255 Cr.P.C. (summons case), Section 248 Cr.P.C. (warrant case) or under Section 335 Cr.P.C. (sessions case). Only when he is convicted, presumption of innocence gets replaced by a judgement of conviction.

40) After consideration of the above legal provisions with regard to investigation and submission of charge-sheet and also the judgements of the Apex Court in this regard, this Court finds that the "appropriate cases" wherein anticipatory bail can be granted are those cases where charge-sheet submitted by the Investigating Officer and process issued by the Court after taking cognizance under Section 204 Cr.P.C. can be quashed by the High Court in exercise of its jurisdiction under Section 482 Cr.P.C. and also some more cases. Therefore, non-grant of anticipatory bail to an accused only on the ground that charge-sheet has been submitted by the Investigating Officer or cognizance has been taken by the Court against him u/s 204 Cr.P.C. without considering the prima facie veracity of the same, will not be in the larger interest of justice.

41) **The following can be considered as "appropriate cases" for grant of anticipatory bail to an accused apprehending arrest, even after submission of charge-sheet against the accused by the Investigating Officer of the police/after taking cognizance of offence against accused under Section 204 Cr.P.C. by the Court** :-

1) Where the charge-sheet has been submitted by the Investigating Officer/cognizance has been taken by the Court, but the merits of the F.I.R/complaint that has been lodged by the informant/complainant are such that it cannot be proved against the accused in the Court;

2) Where there exists a civil remedy and resort has been made to criminal remedy. This has been done because either the civil remedy has become barred by law of limitation or involves time-consuming procedural formalities or involves payment of heavy court fee, like in recovery suits.

The distinction between civil wrong and criminal wrong is quite distinct and the courts should not permit a person to be harassed by surrendering and obtaining bail when no case for taking cognizance of the alleged offences has been made out against him since wrong alleged is a civil wrong only.

When the allegations make out a civil and criminal wrong both against an accused, the remedy of anticipatory bail should be considered favourably, in case the implication in civil wrong provides for

opportunity of hearing before being implicated and punished/penalized. The criminal remedy, in most of the cases, entails curtailment of right to liberty without any opportunity of hearing after lodging of complaint and F.I.R under the provisions of Cr.P.C. which is pre-independence law and disregards Article 14 and 21 of the Constitution of India. Therefore, in such cases where civil and criminal remedy both were available to the informant/complainant, and he has chosen criminal remedy only, anticipatory bail should be favourably considered in such cases.

3) When the F.I.R/complaint has clearly been lodged by way of counterblast to an earlier F.I.R lodged/complaint filed by the accused against the informant/complainant in near proximity of time. The motive of lodging the false F.I.R/complaint is apparent and from the material collected by the Investigating Officer or from the statements of witnesses in complaint case, there is no consideration of the earlier F.I.R lodged/complaint filed by the accused against the informant/complainant;

4) Where the allegations made in the F.I.R/complaint or in the statement of the witnesses recorded in support of the same, taken at their face value, do not make out any case against the accused or the F.I.R/complaint does not discloses the essential ingredients of the offences alleged;

5) Where the allegations made in the F.I.R/complaint are patently absurd and inherently improbable so that no prudent person can ever reach such conclusion that there is sufficient ground for proceeding against the accused;

6) Where charge-sheet has been submitted on the basis of evidence or materials which are wholly irrelevant or inadmissible;

7) Where charge-sheet has been submitted/complaint has been filed but on account of some legal defect, like want of sanction, filing of complaint/F.I.R by legally incompetent authority, it cannot proceed;

8) Where the allegation in the F.I.R/complaint do not consitute cognizable offence but constitute only a non-cognizable offence and investigation has been done by police without order of Magistrate u/s 155(2) Cr.P.C;

9) Where the part of charge in the charge-sheet regarding major offence alleged is not found to be proved and only minor offence has been found to be proved by the Investigating Officer, from the material collected by him during the investigation, the Court can consider granting anticipatory bail to an accused. Since after investigation and submission of charge-sheet the prosecution allegations in the F.I.R have not been found to be fully correct by the Investigating Officer and only part of the charges are found to be proved;

10) Where the investigation has been conducted by the Investigating Officer but the statement of the accused persons have not been recorded by the Investigating Officer and charge-sheet has been submitted only by relying upon the witnesses of the prosecution side. Such a charge-sheet cannot be considered to be in accordance with law since the Investigating Officer is required to consider the case of both sides before submitting charge-sheet before the Court. Therefore, in such cases, anticipatory bail can be granted to an accused provided the accused has cooperated with the investigation. However this cannot be an inflexible rule since in most of the cases the accused do not cooperate with the investigation and it is not easy for Investigating Officer to record their statements. Therefore, what prejudice has been caused to an accused by non-recording of his version in the case diary of

the police has to be demonstrated before the Court. Merely on the technical ground of omission on the part of the Investigating Officer to record the statement of the accused would not constitute a ground for grant of anticipatory bail; and

11) Where there is statutory bar regarding filing of F.I.R and only complaint can be filed, charge-sheet submitted against an accused in such cases would entitle him to apply for anticipatory bail after submission of charge-sheet by the Investigating Officer.

42) The above instances are not exhaustive and in more "appropriate cases", the Court can consider grant of anticipatory bail to an accused after considering the entirety of the facts and circumstances of the case and the material collected by the Investigating Officer/statement of witnesses recorded in support of complaint case.

43) **However, in the following cases, anticipatory bail cannot be granted to an accused after submission of charge-sheet** :-

1) Where the Investigating Officer has submitted charge-sheet but it is argued that the statements of the witnesses recorded are not truthful. Truthfulness or otherwise of the statements of the witnesses recorded by investigating officer in support of complaint case are to be tested during trial and not at the stage of consideration of anticipatory bail application;

2) Where the F.I.R/complaint discloses the alleged offences and the Investigating Officer has collected material which supports the same, without any contradiction, even after considering the statements/material provided by the accused side;

3) Where there are cross cases registered by both the parties against each other and the offences alleged is fully proved and charge-sheet has been submitted. Since the incident, as alleged, has been found to have taken place and both the parties admit such an occurrence, hence, there is no doubt about the incident taking place;

4) Where charge-sheet has been submitted after compliance of the legal formalities like sanction for prosecution and the F.I.R/complaint has been lodged by the competent authority and there is supporting evidence;

5) Where the counterblast implication is alleged that earlier incident took place much before with the incident in dispute and there is no proximity of the second incident in terms of time with the second incident;

6) Where there exists a civil remedy but on the same set of allegations, civil wrong and criminal wrong both are made out and charge-sheet has been submitted only regarding the criminal wrong;

7) Where the Investigating Officer has approached the accused for recording of his statement during investigation and he has refused to give his statement to the Investigating Officer in his defence and charge-sheet has been submitted against him;

8) Where the accused has unsuccessfully challenged the charge-sheet before this Court or any proceedings are pending before this Court regarding the charge-sheet submitted against the accused;

9) Where the offence alleged is serious in nature, the accused is habitual in criminality, tendency of abscondance, has violated the conditions of bail granted to him earlier, etc.; and

10) Where the accused is avoiding appearance before the Court after the

cognizance of offence has been taken by the Court on a police report or in a complaint and coercive processes have been repeatedly issued against him and there is no valid explanation given by the accused for his non-appearance before the Court.

44) These instances are not exhaustive and there may be some unforeseen situations which the Court would consider as per the facts and circumstances of the particular case.

45) **When the anticipatory bail is sought by an accused after submission of charge-sheet against him, the following particulars are required to be given in the anticipatory bail application to arrive at correct conclusion whether the charge-sheet submitted against the accused can withstand the requirements of law of investigation as considered above and also the consideration made by the Apex Court in various judgements in this regard :-**

(i) The charge-sheet along with the entire material collected by the Investigating Officer should be made part of the anticipatory bail application;

(ii) Clear pleading with reference to the material on record should be made stating under which sub-paragraph of paragraph 41 stated hereinabove, the case of the applicant is covered;

(iii) Clear pleading should also be made that the case of the applicant is not barred by paragraph 43 mentioned aforesaid;

(iv) There should be clear averment in the affidavit in support of the anticipatory bail application that the applicant has not challenged the charge-sheet before this Court in any proceeding;

(v) In case the applicant has approached this Court by way of any other proceedings after submission of charge-sheet and has obtained any order in any proceedings, the same shall be disclosed in the anticipatory bail application; and

(vi) Clear pleading should be made in the anticipatory bail application that after submission of charge-sheet, the applicant has not approached any court and no such proceeding is pending.

46) In the present case, from the perusal of the statement recorded by the Investigating Officer, this Court finds that the incident in dispute took place on 04.04.2020 when the first corona wave was sweeping the country and the informant has stated that being a journalist, he got the crowd removed with the help of police since there were chances of spread of infection. Thereafter, the applicant and co-accused persons threatened him not to become a big journalist and he was subjected to caste related abuses and his mother and sister were subjected to abuses. When he tried to speak, they used the word "chamaar" etc., and he was beaten by legs and fists. When he raised alarm, Kamlesh and Rajbir Singh came and saved him. Thereafter, the accused persons left the scene, threatening him of life. Both the accused persons are habitual of misbehaving with the people of locality. The statements of other witnesses recorded by the Investigating Officer also proves the above allegations.

47) From the statements of witnesses recorded by the Investigating Officer, the allegation of intimidation with intent to humiliate a member of scheduled caste in public view by taking his caste name is fully proved.

48) Therefore, in view of the conditions laid down in paragraph 43 sub-

clause 2 of this judgement, this anticipatory bail application deserves to be rejected.

49) It is accordingly, rejected.

(2021)06ILR A17
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.06.2021

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Crl. Misc. Bail Application No. 12961 of 2021

Rahul ...Applicant
Versus
State of U.P. ...Opp. Party

Counsel for the Applicant:
Sri Dhiraj Kumar Pandey

Counsel for the Opp. Party:
A.G.A., Sri Shailesh Kumar Shukla

(a) Bail - In view of the nature of evidence, the period of detention already undergone, the unlikelihood of early conclusion of trial and also the absence of any convincing material to indicate the possibility of tampering with the evidence, the applicant may be enlarged on bail. (Para 8)

Application Allowed. (E-8)

List of Cases cited:-

1. Dataram Singh Vs St.of U.P. & anr. (2018) 3 SCC 22

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

1. The Court convened through video conferencing.

2. Heard learned counsel for the applicant, learned A.G.A. appearing for the State and perused the record.

3. Applicant has moved the present bail application seeking bail in Case Crime No. 560 of 2019 under sections 147, 148, 149, 294, 307, 323, 324, 504, 506 I.P.C., police station Deoband, District Saharanpur.

4. It is submitted by the learned counsel for the applicant that the applicant is an innocent person. He has been falsely implicated in the present case. It is further submitted that there are cross version of incident registered by both the parties. No specific allegation has been assigned against the applicant. In the incident both sides have received injuries and at this stage it cannot be ascertain which party was the aggressor.

5. Learned counsel for the applicant further submits that co-accused Vinod Kumar, Ramesh, Ravindra @ Binder and Vipin have already been granted bail by this Court vide orders dated 27.09.2019, 18.12.2020, 11.01.2021 and 25.03.2021 passed in Criminal Misc. Bail Application Nos. 38960 of 2019, 47066 of 2020, 47328 of 2020 and 13.110 of 2021 respectively. Submission is that the case of the applicant is not on worse footing than that of co-accused who has already been released on bail, and therefore, on principles of parity also the applicant should be released on bail.

6. Several other submissions in order to demonstrate the falsity of the allegations made against the applicant 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 applicant 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 the accused is not having any criminal history and he is in jail since 03.02.2021 and that in the wake of heavy pendency of cases in the Court, there is no likelihood of any early conclusion of trial.

7. Learned A.G.A. opposed the prayer for bail.

8. 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 the absence of any convincing material to indicate the possibility of tampering with the evidence and larger mandate of the Article 21 of the Constitution of India and the law laid down by the Hon'ble Apex Court in the case of **Dataram Singh vs. State of UP and another**, reported in **(2018) 3 SCC 22**, this Court is of the view that the applicant may be enlarged on bail.

9. The prayer for bail is granted. The application is allowed.

10. Let the applicant Rahul involved in Case Crime No. 560 of 2019 under sections 147, 148, 149, 294, 307, 323, 324, 504, 506 I.P.C., police station Deoband, District Saharanpur be released on bail on his executing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned on the following conditions :-

(1) The applicant will not make any attempt to tamper with the prosecution evidence in any manner whatsoever.

(2) The applicant will personally appear on each and every date fixed in the court below and his personal presence shall not be exempted unless the court itself deems it fit to do so in the interest of justice.

(3) The applicant shall cooperate in the trial sincerely without seeking any adjournment.

(4) The applicant shall not indulge in any criminal activity or commission of any crime after being released on bail.

(5)The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad or certified copy issued from the Registry of the High Court, Allahabad.

(6) 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

11. It may be observed that in the event of any breach of the aforesaid conditions, the court below shall be at liberty to proceed for the cancellation of applicant's bail.

12. It is clarified that the observations, if any, made in this order are strictly confined to the disposal of the bail application and must not be construed to have any reflection on the ultimate merits of the case.

(2021)06ILR A18
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.03.2021

BEFORE

THE HON'BLE RAHUL CHATURVEDI, J.

Crl. Misc. Bail Application No 14323 of 2021
With Crl. Misc. Bail Appl. Nos. 15138 of 2021, 15101 of 2021 & 15110 of 2021

Nishant @ Nishu ...Applicant

Versus

State of U.P. ...Opp. Party

Counsel for the Applicant:
Sri Anil Kumar Shukla

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

(a) Bail - Gang Chart - U.P. Gangster and Anti-Social Activities (Prevention) Act, 1986

The Court has observed that due to no rules or procedure for the Act, an incomplete and half baked gang charts were prepared by the informants of different applications which were later on mechanically approved by the responsible higher police authorities of the district, against that Gang. It is not the discretion of the prosecution to add or subtract the number of cases from his gang chart according to their sweet will and at the time of consideration of their bail applications, serve out those cases which are not in the chart. In order to curb this malpractice, the Court directed to frame proper Rules of the present enactment pursuant to the provisions contained in Section 27 of the U.P. Act. (Para 35)

Application Allowed. (E-8)

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

[1] Heard the submissions of respective learned counsels for the different applicants of their respective bail applications, learned A.G.A and perused the records of the case.

[2] Since all these above mentioned bail applications suffers from same vice of law i.e 'incomplete and defective gang chart' which does not indicate the accused's complete past credentials, giving ample room for miscarriage of justice, resultantly, the accused-applicant tends to be bailed out easily. Additionally, this court purposes to decide all the four bail applications on merits by a common order.

[3] The present order is in two parts, in the earlier part, all the four bail applications are decided on merits and in the later part, there is discussion/judgment on defective gang-chart and its adverse impact on bail as well as trial of the accused concern.

Before deciding the cases on merits, it is imperative to give factual narration of the issue of the respective bail applications :-

FACTUAL INTRODUCTION OF BAIL APPLICATIONS:-

[4] Applicant **Nishant @ Nishu** is behind the bars since 29.9.2020 in connection with Case Crime No. 433/2020 U/s 2/3 of U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986 Police Station Civil Lines, District Muzaffar Nagar.

[5] Learned Counsel states that the gang chart annexed as Annexure No. 2 to the affidavit shows that Usman @ Sheru is its gang leader and the applicant has been shown as its active member of that gang. Only ONE case is shown in the gang chart to the credit of the applicant at Police Station Civil Lines, District Muzaffar Nagar.

[6] On this, it has been contended by learned counsel that since only one case is shown in the gang chart, having Case Crime No. 306/2020 on which the applicant is on bail. The copy of the bail order is annexed as Annexure No.3 to the affidavit. Thus on the above factual premises, it has been argued that, on account of singular case in which the applicant has already been bailed out and have never misused the liberty of bail. Besides this, it is further submitted that there is no justifiable reason for the prosecution to implicate the

applicant in U.P. Gangsters Act by imposing stringent condition and branding the applicant as its gang member. Thus applicant deserves to be bailed out.

[7] Similarly the accused of Bail Application No. 15138/2021, is **Amit**, the applicant facing incarceration since 16.8.2020 in connection with Case Crime No. 274/2020 U/s 2/3 of U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986, P.S. Madrak District Aligarh.

[8] Submission advanced by learned Counsel for the applicant, after drawing attention of the court, the gang chart (Annexure No.2) which shows that he is member of a alleged gang and only TWO cases are shown in the chart to his credit. Argued by the counsel for the applicant that he is enjoying his freedom by way of bail in both the cases and has never misused the liberty so granted to him. The bail orders are annexed as Annexure No.3 to the affidavit, and thus, submitted that the applicant deserves to be bailed out in the instant case too.

[9] In this series, yet another case on behalf of **KASHISH SRIVASTAV**, who is behind the bars since 5.8.2020 in relation to Case Crime No. 290/2020 U/s 2/3 of U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986, P.S. Cantt, District Prayagraj (Allahabad). After showing the gang chart (Annexure No.2), contention advanced by the learned counsel for the applicant that only FOUR cases are shown in the chart. The applicant is on bail in all the four cases by different courts. Bail orders are annexed as Annexure No.3 to the affidavit. Learned Counsel has toed same lines of arguments as his predecessors and tried to impress upon the court that the applicant too is entitled for bail.

[10] Last case in this chain is on behalf of **NAUSHAD**, the accused/applicant, who is facing prosecution by way of Case Crime No. 590/2020 U/s 2/3 of U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986, P.S. Fatehpur, District Saharanpur.

[11] The gang-chart annexed as Annexure No.2 to the affidavit clearly indicates that there are only TWO cases to the credit of the applicant and on different occasions in both these cases he was granted bail. The bail orders are annexed as Annexure No. 3 and 4 to the affidavit. Thus argued by the counsel that he has not misused the liberty of bail and as such, he is entitled for bail in the instant case too.

[12] Thus from the above, it is clear that in all the four bail applications, the gang-chart which were annexed clearly indicates that less than five cases are to the credit of respective accused applicants and in all those cases the applicants were on bail but the informants of respective FIRs after clubbing few of the previous cases(not mentioned in the gang chart) allegedly branded the accused/applicants as member/or the leader of a particular gang, who are indulge in committing heinous offences, through their illegal organization, against innocent persons of the society. They all are as per habit commit serious and heinous offences of different types and shades. It has been argued by the learned counsels for the applicants that informants of these FIRs are police personnels(mostly SHOs of the police station), after over-stapping their powers vested in them and with motive to saddle the applicants with additional criminal liability, have illegally fasten more stringent prosecution by way of U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986. It is

argued that instant prosecution is nothing but gross misuse of powers vested in them (informant), which was later on blindly supported and approved by the local police and administrative superior authorities while approving the gang chart.

[13] Per contra, learned A.G.A. vehemently opposed the prayer for bail of the respective accused/applicants, after putting the record straight. It has been contended by learned A.G.A. that submissions advanced by various counsels for the applicants are factually incorrect and wrong. All the applicants are harden and habitual offenders, involved in an organized criminal activities posing serious threat to the society. It has been contended that :-

(a) The applicant **Nishant @ Nishu** in addition to the cases shown in the gang chart, he has got 15 other cases to his credit, which is clear from his bail rejection order. A person who is involved in 15+ cases, deserves no sympathy from the Court.

(b) The applicant **Amit** too is involved in two other cases, in addition to the cases shown in his gang chart.

(c) Accused **Kashish Srivastav**, the third applicant is involved in three other cases in addition to the cases shown in his gang chart. Thus in total the number of cases swelled from four to seven cases.

(d) And at the end, the applicant **Naushad** in all, there are EIGHT cases to his credit, though the gang-chart has shown only SIX cases.

[14] Indeed, in opinion of the Court, it is a cabbalistic and mysterious situation where the applicants at the stage of their bail before this Court are taken by surprise by the State. This is beyond the settled tenets of fair play and equality. No accused shall be taken by surprise. The Court is failed to appreciate the alleged impediment in preparing full and complete gang chart of that bunch of alleged outlawed persons. The prosecution has to stick upon the stand taken by them from the day one.

[15] It is not the discretion of the prosecution to add or substract the number of cases from his gang chart according to their sweet will and at the time of consideration of their bail applications, serve out those cases which are not in the chart. The Court is at loss to appreciate this practice by the prosecution. Learned A.G.A. too has failed to solve this puzzle and lift the veil from this uncanny situation. The Court records its deep anguish, resentment to such type of hide and seek practice by none other than the State (Prosecutor) itself. The Court takes it like that, the prosecutor are hiding the cards in their sleeves so as to poison and bias the judicial mind of the Court against the applicant and succeeds in getting their bail applications rejected showing and swelling the number of cases against the applicant. This is explicitly a malpractice on the part of the prosecution, who instead of giving holistic view regarding criminal antecedents of the concern person, has given only a piecemeal and incomplete picture in their respective gang chart. The Court does not want to become a party to such type of underhand dealing and short coming on the part of prosecutor. After assessing the facts of the case and the antecedents of accused persons, this court is of the considered opinion that all the applicants namely; **(i)Amit, (ii)Kashish Srivastav and (iii)Naushad** be released on bail. The bail applications of above named accused/applicants stands allowed.

[16] Let the applicants, **Amit, Kashish Srivastav and Naushad**, who are involved in the aforesaid sections of U.P.

Gangsters Act, 1986 be released on bail on their furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned subject to following conditions. Further, before issuing the release order, the sureties be verified.

(i) THE APPLICANT SHALL FILE AN UNDERTAKING TO THE EFFECT THAT SHE SHALL NOT SEEK ANY ADJOURNMENT ON THE DATE 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 HER COUNSEL. IN CASE OF HER ABSENCE, WITHOUT SUFFICIENT CAUSE, THE TRIAL COURT MAY PROCEED AGAINST HER UNDER SECTION 229-A IPC.

(iii) IN CASE, THE APPLICANT MISUSES THE LIBERTY OF BAIL DURING TRIAL AND IN ORDER TO SECURE HER PRESENCE PROCLAMATION UNDER SECTION 82 CR.P.C., MAY BE ISSUED AND IF APPLICANT FAILS TO APPEAR BEFORE THE COURT ON THE DATE FIXED IN SUCH PROCLAMATION, THEN, THE TRIAL COURT SHALL INITIATE PROCEEDINGS AGAINST HER, IN ACCORDANCE WITH LAW, UNDER SECTION 174-A IPC.

(iv) THE APPLICANT SHALL REMAIN PRESENT, IN PERSON, BEFORE THE TRIAL COURT ON DATES FIXED FOR (1) OPENING OF THE CASE, (2) FRAMING OF CHARGE AND (3) 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 HER IN ACCORDANCE WITH LAW.

(v) THE TRIAL COURT MAY MAKE ALL POSSIBLE EFFORTS/ENDEAVOUR AND TRY TO CONCLUDE THE TRIAL WITHIN A PERIOD OF ONE YEAR AFTER THE RELEASE OF THE APPLICANT.

In case of breach of any of the above conditions, it shall be a ground for cancellation of bail.

It is made clear that observations made in granting bail to the applicant shall not in any way affect the learned trial Judge in forming his independent opinion based on the testimony of the witnesses.

Since the bail application has been decided under extra-ordinary circumstances under prevailing COVID pandemic, thus in the interest of justice following additional conditions are being imposed just to facilitate the applicant to be released on bail forthwith. Needless to mention that these additional conditions are imposed to cope with emergent condition-:

1. The applicant shall be enlarged on bail on execution of personal bond without sureties till normal functioning of the courts is restored. The accused will furnish sureties to the satisfaction of the court below within a month after normal functioning of the courts are restored.

2. The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad.

3. The computer generated copy of such order shall be self attested by the counsel of the party concerned.

4. 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.

[17] So far as the applicant Nishant@Nishu is concerned, since there are 15+ cases are shown in the bail rejection order, this court cannot shut its eyes having long criminal history. Thus learned counsel for the applicant is directed to file a supplementary affidavit explaining the antecedents of applicant Nishant @ Nishu after annexing relevant bail orders/trial judgments and the stage of the different trials, within four weeks. Learned A.G.A. may also file counter affidavit within same period with revised gang chart with full details. List this bail application of Nishant @ Nishu only in the second week of July, 2021 before appropriate Court for consideration of his bail.

(II) Now the Court intends to decide the second part of the issue :-

[18] After deciding the above mentioned bail applications, the Court is saddled with more important question of law, which indeed is boggling to the Court, that is to say, incomplete and half backed gang-chart of individual accused by which the accused/applicant takes out the benefit from the same and gets easily bailed out. The said gang-chart is prepared by concern informant (mostly SHOs of the police station), which was later on affirmed and approved by higher police as well as administrative authorities of the district branding that individual as 'Gangster'.

[19] The basic aim and objective of Uttar Pradesh Gangsters and Anti Social Activities (Prevention) Act, 1986, is to make special provisions by giving sharp teeth to the police to curb and cope with "gangsters and their anti-social activities" and for matters connected therewith or incidental thereto. The State legislature brought into force the above mentioned legislation on 15th January, 1986 with a view to handle the menace of "Organized Crime' in the State in more effective way. The Act is exhaustive and defines gangsterism and gangsters therein. Section 23 of the above Act, U.P. Act No. 7 of 1986 empowers the State Government may, by notification make RULES for carrying out the purposes and object of the enactment in more uniform and definite manner, ruling out any grain of arbitrariness in the procedure.

[20] Learned counsels for the rival parties are not at variance in informing the Court that no RULES have been framed even after lapse of 35 years of the said enactment by the State Government giving a ample space to the police authorities to misuse the powers and harass innocents according to their whims and capricious. The Court has experienced that these police authorities have fasten plural numbers of proceedings under the aforesaid Act, without waiting the final outcome from the law courts with regard to the earlier proceedings.

[21] Taking the advantage of this void when there are no rules or procedure for the present Act, only, an incomplete and half

backed gang-charts were prepared by the informants of different bail applications which were later on mechanically approved by the responsible higher police authorities of the district, against that Gang. Accordingly, the named accused are fasten with additional criminal liability by way of lodging of the FIR under the U.P. Gangsters Act, 1986. This Court is of considered opinion that without being tested in the cruciable of its trial before the competent law court, it would not serve the objective and purpose of present enactment merely by adding the numbers of proceedings under present Act or other ancillary enactments.

[22] As mentioned above, since the features are in fluid stage, different benches of this Court since 2003 while deciding various proceedings, have cautioned the police and executive time and again, that no case of false implication shall recur either by any malpractice or motivated prosecution by the police authorities. In response to these directions of this Court, Principal Secretary, Home and the then D.G. Police vide his letter dated 24.10.2003 wrote following letter: -

डीजी परिपत्र संख्या–27/2003
वी0के0बी0 नायर
आई0पी0एस0
पुलिस महानिदेशक उत्तर प्रदेश,
1,तिलकमार्ग, लखनऊ।
दिनांक– अक्टूबर, 24, 2003
प्रिय महोदय,

उ0प्र0 में अपराधी, अपराधियों, अराजक तत्वों, समूह बनाकर अपराध करने वाले लोगों, समाज विरोधी किया कलापों में संलग्न व्यक्तियों पर नियन्त्रण रखने तथा उनकी गतिविधियों पर अंकुश बनाये रखने के उद्देश्य से प्रदेश में उ0प्र0 गुण्डा नियन्त्रण अधिनियम 1970 एवं उ0प्र0 गिरोह बन्द एवं समाज विरोधी क्रिया कलाप (निवारण) अधिनियम 1986 का प्रावधान है।

इन अधिनियमों का उपयोग केवल पात्र व्यक्तियों के विरूद्ध ही हो एवं इसका दुरूपयोग न हो, इसलिए इस विषय पर समय समय पर विस्तृत निर्देश जारी किये गये है, किन्तु0 मा0 उच्च न्यायालय तथा इस मुख्यालय के संज्ञान में कुछ ऐसे प्रकरण आये हैं, जिससे यह प्रतीत होता है कि इन अधिनियमों का दुरूपयोग रोकने के लिए शासन द्वारा जो दिशा–निर्देश जारी किये गये है उनका उचित

मा0 उच्च न्यायालय ने रिट याचिका संख्या 6249/2003 अमरनाथ दुबे बनाम उ0प्र0 राज्य एवं अन्य में उ0प्र0 समाज विरोधी क्रिया–कलाप और गिरोह बन्द अधिनियम के दुरूपयोग पर अप्रसन्नता व्यक्त किया है तथा यह निर्देश दिया है कि उपरोक्त का दुरूपयोग करने वाले अधिकारियों पर भारी अर्थदण्ड लगाया जा सकता है ।

अतः उपरोक्त दोनों अधिनियमों के कियान्वयन के सम्बन्ध में निम्नलिखित दिशा–निर्देश जारी किये जा रहे है । आप अक्षरशः अनुपालन सुनिश्चित करें, आपको यह भी सचेत किया जाता है कि यदि भविष्य में कोई ऐसा प्रकरण संज्ञान में आता है जिससे यह प्रतीत हो कि इन निर्देशों का उल्लंघन किया गया है या प्रकरण के विश्लेषण से ऐसा स्पष्ट हो कि आपकी या आपके किसी अधीनस्थ द्वारा जानबूझकर, लापरवाही या त्रुटिपूर्ण आचरण के कारण किसी निर्देश व्यक्ति के विरूद्ध उपरोक्त अधिनियमों के अन्तर्गत कार्यवाही की गयी है तो दोषी अधीनस्थ पुलिस कर्मियों के अतिरिक्त आपके विरूद्ध कठोर दण्डात्मक कार्यवाही की जायेगी ।

उ0प्र0 समाज विरोधी क्रिया कलाप एवं गिरोह बन्द अधिनियम 1986 के अन्तर्गत कार्यवाही–

1– उ0प्र0 गिरोह बन्द अधिनियम एवं समाज विरोधी क्रिया कलाप (निवारण) अधिनियम 1986 के अन्तर्गत कार्यवाही करने के लिए उ0प्र0श्शासन के शासनादेश संख्या– 3216/8–9–1986 दिनांक 23 जून, 1986, शासनादेश संख्या 3352/छ–पु0–9–1997 दिनांक 10 अक्टूबर, 1997 द्वारा विस्तृत दिशा निर्देश जारी किये गये है । किसी भी अपराधिक प्रवृत्ति के व्यक्ति के विरूद्ध कार्यवाही करने से पूर्व यह सुनिश्चित करें कि सम्बन्धित व्यक्ति इस अधिनियम के अन्तर्गत कार्यवाही किये जाने के लिए पात्र है ।

2– किसी भी गिरोह के विरूद्ध कार्यवाही करने के लिए उसके विरूद्ध केवल उन्हीं मामलों को आपराधिक सूची में सम्मिलित मानना चाहिए जिन मामलों में पुलिस द्वारा विवेचना के उपरान्त आरोप–पत्र प्रेषित की जा चुकी है या न्यायालय द्वारा विचारण के उपरान्त अभियुक्त को दोषमुक्त किया जा चुका है, उसे आपराधिक विवरण में सम्मिलित न किया जाय।

3– जिन मामलों के आधार पर उ0प्र0 समाज विरोधी क्रिया कलाप एवं गिरोह बन्द अधिनियम के

अन्तर्गत कार्यवाही की गयी है उसी आधार पर पुनः कार्यवाही न की जाये अर्थात किसी गिरोह के विरूद्ध उ0प्र0 समाज विरोधी क्रिया कलाप एवं गिरोह बन्द अधिनियम के अन्तर्गत कार्यवाही करने के बाद कोई नया अपराधिक कृत्य प्रकाश में आने पर ही उ0प्र0 समाज विरोधी क्रिया कलाप के अन्तर्गत कार्यवाही की जाये ।

4– किसी गिरोह के विरूद्ध कार्यवाही प्रारम्भ करने के लिए थानाध्यक्ष द्वारा गिरोह के आपराधिक विवरण का उल्लेख करते हुए चार्ट तैयार किया जायेगा तथा चार्ट के अतिरिक्त गिरोह के क्रिया कलापों का विवरण देते हुए तथा गिरोह के किन–किन व्यक्तियों के विरूद्ध कार्यवाही किया जाना प्रस्तावित है, उसका स्पष्ट उल्लेख करते हुए प्रतिवेदन प्रस्तुत किया जायेगा जो क्षेत्राधिकारी तथा अपर पुलिस अधीक्षक की स्पष्ट संस्तुति के बाद वरिष्ठ पुलिस अधीक्षक/पुलिस अधीक्षक को प्रस्तुत किया जायेगा ।

5– वरिष्ठ पुलिस अधीक्षक/पुलिस अधीक्षक प्रभारी अपने स्तर पर गिरोह के सदस्यों के आपराधिक विवरण तथा उनके क्रिया कलापों का भली भांति परीक्षण के उपरान्त जिलाधिकारी के साथ विचार–विमर्श करके सूची को अन्तिम रूप प्रदान करेंगे।

6– प्रतिवेदन तथा गैंग चार्ट पर वरिष्ठ पुलिस अधीक्षक/पुलिस अधीक्षक एवं जिलाधिकारी के अनुमोदन के उपरान्त अग्रिम कार्यवाही की जायेगी ।

7– इस अधिनियम के अन्तर्गत पंजीकृत अभियोगों की विवेचना अनिवार्यतः थाना प्रभारी द्वारा की जानी चाहिए ।

8– इस अधिनियम के अन्तर्गत पंजीकृत अभियोगों की विवेचना के बाद आरोप–पत्र भेजने से पूर्व जिलाधिकारी से सहमति प्राप्त कर ली जायेगी ।

9– विवेचना की अवधि में मा0 उच्चतम न्यायालय के आर0 सरला बनाम टी0एस0 वेल एवं अन्य में पारित निर्णय दिनांक 13 अप्रैल, 2002 का भी अनुपालन किया जाये।

[23] Here, it is pertinent to mention here that above letters were issued by the D.G. Police and thereafter G.O. Dated 02.01.2004, pursuant to the direction given by this Court while deciding Writ Petition No. 6249/2003 Inre: Amar Nath Dubey Vs. State of U.P.

[24] Noticing the above letter, and the direction contained in the order of Division Bench of this Court, Principal Secretary (Homes) issued yet another set of procedure/instruction mentioning therein the manner in which gang chart in relation to offences under the Gangsters Act has to be prepared. These were all ad hoc practices adopted by higher bureaucracy just to make a stop gap arrangement and an effort to plug the void, in place of formal Rules as contemplated by Section 23 of the Act. Clause 2 of these instructions would indicate the details of information that has to be contained therein. The said instruction issued by Principal Secretary Homes, in the shape of Government Order is extracted herein below: -

''संख्या 137 प्र0सं0/6–पु0–11–2003–58 (रिट)/2003

प्रेषक,

अनिल कुमार,
प्रमुख सचिव,
उ0प्र0 शासन।

सेवा में,

समस्त जिलाधिकारी,
जनपदीय वरिष्ठ पुलिस अधीक्षक/पुलिस अधीक्षक,
उत्तर प्रदेश।

गृह (पुलिस) अनुभाग–11 लखनउ दिनांक 2 जनवरी 2004

महोदय,

मा0 उच्च न्यायालय, इलाहाबाद के द्वारा रिट याचिका संख्या 6249/2003 अमरनाथ दुबे बनाम उ0प्र0 राज्य एवं अन्य में उ0प्र0 गिरोहबन्द व समाजबिरोधी क्रिया कलाप निवारण अधिनियम के दुरूपयोग पर चिन्ता व्यक्त की है। मा0 उच्च न्यायालय ने उ0प्र0 गिरोहबन्द निवारण अधिनियम उ0प्र0 गुण्डा अधिनियम एवं एन0डी0पी0एस0 अधिनियम के सम्यक उपयोग हेतु आवश्यक दिशा निर्देश जारी करने एवं दुरूपयोग रोकने हेतु यथोचित कदम उठाने के लिए कडे निर्देश दिये है ।

इन अधिनियमों के सम्यक सदुपयोग करने एवं इनके दुरूपयोग के रोकथाम हेतु समय समय पर विस्तृत निर्देश पूर्व में जारी किये गये है। परन्तु ऐसा प्रतीत होता है कि इन अधिनियमों का दुरूपयोग रोकने के लिए शासन/पुलिस महानिदेशक, उ0प्र0 द्वारा जो दिशा निर्देश जारी किये गये है, उनका कडाई से अनुपालन नहीं किया जा रहा है। आप सहमत होगें कि निर्दोष व निरपराध व्यक्तियों के विरूद्ध इन अधिनियमों के अन्तर्गत दिये गये अधिकारों का दुरूपयोग कुछ अधिकारियों द्वारा किये जाने के कारण शासन एवं पुलिस विभाग की छवि पर प्रतिकूल प्रभाव पडता है।

अतः इस सम्बन्ध में पुनः निम्नलिखित दिशा निर्देश दिये जा रहे है, जिनका कड़ाई से अनुपालन सुनिश्चित किया जाये–

1– समस्त थाना प्रभारी, क्षेत्राधिकारी, अपर पुलिस अधीक्षक वरिष्ठ पुलिस अधीक्षक/पुलिस अधीक्षक, प्रभारी जनपद एवं जिलाधिकारी इस अधिनियम में दिये गये प्राविधानों का अध्ययन करके इसको भली भंति समझ लें। इस हेतु यह जान लेना रहेगा कि जनपद स्तर पर एक कार्यशाला आयोजित करा ली जाये जिसमें सभी अधिकारियों के अलावा जनपद के जिला शासकीय अधिवक्ता– फौजदारी एवं ज्येष्ठ अभियोजन अधिकारी प्रभारी भी अवश्य उपस्थित रहे। यदि किसी अधिकारी की किसी स्तर पर इन अधिनियमों के किसी प्राविधान के बारे में किसी प्रकार की कोई शंका हो तो इस कार्यशाला में उनका निराकरण करा लिया जाये।

2– इन अधिनियमों के सम्यक प्रयोग करने, दुरूपयोग रोकने के सम्बन्ध में इस आदेश के माध्यम से निम्नवत दिशा निर्देश आपको दिये जा रहे है। कृपया इनका कडाई से अनुपालन सुनिश्चित कराये –

उ0प्र0 गिरोहबन्द एवं समाज विरोधी क्रिया कलाप (निवारण) अधिनियम के सम्यक उपयोग करने/दुरूपयोग रोकने के सम्बन्ध में दिशा निर्देश–

1– इस अधिनियम के अन्तर्गत कार्यवाही केवल उन्हीं अपराधियों के विरूद्ध की जाये, जिनकी आपराधिक गतिविधि इस अधिनियम में दिये गये प्राविधान की परिधि के अन्तर्गत आती है ।

2– किसी गिरोह के विरूद्ध कार्यवाही प्रारम्भ करने के लिए थाना प्रभारी द्वारा गिरोह के आपराधिक विवरण का उल्लेख करते हुए चार्ट तैयार किया जायेगा तथा **चार्ट के अतिरिक्त गिरोह के क्रिया कलापों का विवरण देते हुए** तथा गिरोह के किन किन व्यक्तियों के विरूद्ध कार्यवाही किया जाना प्रस्तावित है, उसका स्पष्ट उल्लेख करते हुए आख्या प्रस्तुत की जायेगी, जो क्षेत्राधिकारी तथा अपर पुलिस अधीक्षक की स्पष्ट संस्तुति के बाद वरिष्ठ पुलिस अधीक्षक/पुलिस अधीक्षक प्रभारी को प्रस्तुत की जाये।

3– वरिष्ठ पुलिस अधीक्षक/पुलिस अधीक्षक प्रभारी अपने स्तर पर गिरोह के सदस्यों के अपराधिक विवरण तथा उनके क्रिया कलापों का भली भांति परीक्षणत के उपरान्त जिलाधिकारी के साथ विचार विमर्श करके इस सूची को अन्तिम रूप प्रदान करेंगे।

4– उक्त आख्या तथा गैंग चार्ट पर वरिष्ठ पुलिस अधीक्षक/पुलिस अधीक्षक प्रभारी एवं जिलाधिकारी के अनुमोदन के उपरान्त अग्रिम कार्यवाही की जायेगी।

5– किसी भी गिरोह के विरूद्ध कार्यवाही करने के लिए उसके विरूद्ध केवल उन्हीं मामलों को अपराधिक सूची में सम्मिलित मानना चाहिए, जिन मामलों में पुलिस द्वारा विवेचना के उपरान्त आरोप पत्र प्रेषित किया जा चुका है। जिन मामलों में अन्तिम रिपोर्ट प्रेषित की जा चुकी है या न्यायालय द्वारा विचारण के उपरान्त अभियुक्त को दोषमुक्त किया जा चुका है उसे आपराधिक विवरण में सम्मिलित न किया जाये।

6– जिन मामलों के आधार पर उ0प्र0 समाज विरोधी क्रिया कलाप एवं गिरोहबन्द अधिनियम के अन्तर्गत कार्यवाही की गयी है, उसी आधार पर पुनः कार्यवाही न की जाये। अर्थात किसी गिरोह के विरूद्ध उ0प्र0 समाज विरोधी क्रिया कलाप एवं गिरोहबन्द अधिनियम के अन्तर्गत कार्यवाही करने के बाद कोई नया आपराधिक कृत्य जो इस अधिनियम के प्राविधानों की परिधि में हो, प्रकाश में आने पर ही उ0प्र0 समाज विरोधी क्रिया कलाप के अन्तर्गत कार्यवाही की जाये ।

7– इस अधिनियम के अन्तर्गत पंजीकृत अभियोगों की विवेचना अनिवार्यतः दूसरे थाने के प्रभारी द्वारा की जानी चाहिए ।

8– इस अधिनियम के अन्तर्गत पंजीकृत अभियोगों की विवेचना के बाद वरिष्ठ पुलिस अधीक्षक/पुलिस अधीक्षक प्रभारी से अनुमोदन प्राप्त करने के उपरान्त ही आरोप पत्र न्यायालय प्रेषित किया जाय।

9– गिरोहबन्द अधिनियम के अन्तर्गत मुकदमा पंजीकृत करने के उपरान्त विवेचना के पश्चात न्यायालय आरोप पत्र प्रेषित करने हेतु अनुमोदन देने के पूर्व वरिष्ठ पुलिस अधीक्षक/पुलिस अधीक्षक प्रभारी को भली भंति संतुष्ट हो लेना चाहिए कि वास्तव में मामला गिरोहगन्द अधिनियम की परिधि में आता है अथवा नहीं।

10– यहां यह भी स्पष्ट किया जाता है कि यदि किसी जनपद में इस अधिनियम में दिये गये प्राविधानों के सम्बन्ध में किसी अधीनस्थ अधिकारी द्वारा अपने कर्तव्य पालन की उपेक्षा करने अथवा अपने अधिकार का दुरूपयोग का कोई मामला प्रकाश में आता है तो सम्बन्धित थाना प्रभारी एवं दोषी पाये गये अधिकारी के अलावा जनपद के वरिष्ठ पुलिस अधीक्षक/पुलिस अधीक्षक प्रभारी भी उत्तरदायी माने जायेंगे।

XXX XXXX XXX XXX XXXX XX XXX

सामान्य निर्देश–

1– इन दिशा–निर्देशों के अनुपालन सुनिश्चित कराने की जिम्मेदारी जनपद के वरिष्ठ पुलिस अधीक्षक/पुलिस अधीक्षक प्रभारी की है।

2– यदि किसी जनपद में इन अधिनियमों के दुरूपयोग किये जाने का कोई मामला प्रकाश में आये, तो किसी भी स्तर पर दोषी अधिकारियों/कर्मचारियों को बचाने का प्रयास न किया जाये, वरन दोष निर्धारण करते हुए तत्परता से दोषी के विरूद्ध कार्यवाही की जाये।

3– इन अधिनियमों के अन्तर्गत दिये गये प्राविधानों का दुरूपयोग किये जाने का यदि कोई मामला प्रथम दृष्टया सही पाया जाये तो सम्बन्धित थाने के प्रभारी एवं अन्य दोषी अधीनस्थ पुलिस कर्मियों को थाने

से हटा दिया जाये एवं तत्परता से जांच कराकर उनके विरूद्ध दण्डात्मक कार्यवाही की जाये।

4– प्रत्येक माह जिलाधिकारी एवं वरिष्ठ पुलिस अधीक्षक/पुलिस अधीक्षक, प्रभारी अपनी मासिक गोष्ठी में इस आदेश के माध्यम से दिये जा रहे दिशा–निर्देशों के अनुपालन के सम्बन्ध में भी अनुश्रवण किया करेंगे।

5– सभी को यह स्पष्ट किया जाता है कि शासन अथवा पुलिस महानिदेशक उ0प्र0 के संज्ञान में यदि कोई ऐसा मामला आता है कि किसी मामले में इन अधिनियमों का दुरूपयोग किये जाने की जानकारी वरिष्ठ पुलिस अधीक्षक/पुलिस अधीक्षक प्रभारी को होने के पश्चिात भी पीडित पक्ष को न्याय नहीं दिलाया गया अथवा दोषी अधिकारी, कर्मचारी के विरूद्ध यथेष्ठ कार्यवाही नहीं की गयी है, तो ऐसे मामलों में वरिष्ठ पुलिस अधीक्षक/पुलिस अधीक्षक प्रभारी जिम्मेदार माने जायेंगे।

भवदीय,
(अनिल कुमार)
प्रमुख सचिव
संख्या एवं दिनांक तदैव

प्रतिलिपि–निम्नलिखित को आवश्यक कार्यवाही हेतु–

1– पुलिस महानिदेशक, उ0प्र0।
2– पुलिस महानिदेशक, अभियोजन, उ0प्र0।
3– अपर पुलिस महानिदेशक, सी बी सी आई डी, उ0प्र0।
4– अपर पुलिस महानिदेशक, रेलवेज, उ0प्र0

आज्ञा से,
(दीपिका दुग्गल)
विशेष सचिव
संख्या एवं दिनांक तदैव

प्रतिलिपि–निम्नलिखित को अनुपालन सुनिश्चित कराने हेतु–

1– समस्त मण्डल आयुक्त, उ0प्र0।
2– समस्त पुलिस महानिरीक्षक, जोन उ0प्र0।
3– समस्त परिक्षेत्रीय उपमहानिरीक्षक, उ0प्र0।

आज्ञा से,
(दीपिका दुग्गल)
विशेष सचिव

[25] I have perused the above Government communications in this regard. Its paragraph nos. 2,4,5 and 6 are relevant for the present purpose. From this communications, it is clear that for the purposes of additional prosecution under U.P. Gangsters Act, only with regard to those cases against the individual, in which charge-sheet has been submitted by the police. Those cases which have ended into acquittal or Final Report has been submitted shall be discounted from the gang chart. Para 3 of the above letter states, that after clubbing all the previous criminal cases/additional criminal case under the present Act a gang chart may be prepared by the police. Pending earlier proceeding under the present Gangsters Act, if subsequent or successive proceedings under the present Act is proposed, then earlier cases shall not be included in succeeding gang chart. In para 4 of the letter, the concern S.H.O. of the Police Station is given responsibility to prepare the gang-chart of the concern individual. After the preparation said chart would be produced before the C.O./Addl. S.P. for its approval and thereafter, S.P./S.S.P. of the District shall give final shape to the gang chart. The concern S.P./S.S.P. would look into the proposed gang chart and after due modification (if at all is needed) give a final shape to the said gang-chart. So far as the successive prosecution under present Act is concerned, as mentioned above, while preparing the earlier gang chart, the cases shown in it shall be discounted in the second/successive gang chart.

TEST CASE :-

[26] At this juncture, this court proposes to mention the facts of **Criminal Misc. Bail Application no 14323 of 2021 in re: Nishant @ Nishu Vs. State of U.P**. as a sample. Table hereinbelow is extracted from his bail rejection order of the accused-applicant shows that there are as many as 15 cases are shown to his credit, which relates to the year 2018 and 2020. The list shows that he or the gang was mostly operational in different police stations of

Muzzafarnagar and only one case at police station Ranipur, Haridwar. In the year 2018, the police has instituted one case, having case crime No.1203 of 2018 u/s 2/3 U.P. Gangster Act at Police Station Kotwali Nagar, Muzzafarnagar against accused Nishant@Nishu with regard to above case-crime, the applicant approached this Court, seeking bail. In the years 2019, bail order of Criminal Misc. Bail application No.36841 of 2019 dated 18.09.2019 (annexure 16) shows that while allowing the above bail application, this Court has opined that gang chart in above case has indicated only 5 cases to the credit of applicant and that is why he has been bailed out. However, in the rejection order table of criminal cases of Nishant @ Nishu spells out the long criminal history of the applicant, is as follows :-

Sl.No.	Case Crime No.	Under Sections of I.P.C.	Police Station and District.
1.	846/18	392/411 IPC	Kotwali Nagar, Muzaffar Nagar.
2.	872/18	307 IPC	Kotwali Nagar, Muzaffar Nagar.
3.	873/18	25 Arms Act.	Kotwali Nagar, Muzaffar Nagar.
4.	211/18	393 IPC	Chapaaz, Muzaffar Nagar.
5.	358/18	392 IPC	Shahpur, Muzaffar Nagar.
6.	258/18	307/427 IPC	Manoorpur, Muzaffar Nagar.
7.	611/18	392 IPC	Nai Mandi, Muzaffar Nagar
8	621/18	392 IPC	Nai Mandi, Muzaffar Nagar.
9.	437/18	302, 120B IPC	Ranipur, Haridwar.
10.	811/18	302 IPC	Kotwali Nagar, Muzaffar Nagar.
11.	346/18	414 IPC	Civil Lines, Muzaffar Nagar
12.	1203/18	2/3 of U.P. Gangsters Act.	Kotwali Nagar, Muzaffar Nagar.
13.	306/20	392/411 IPC	Civil Lines, Muzaffar Nagar.
14.	433/20	2/3 U.P. Gangsters Act.	Civil Lines, Muzaffar Nagar.
15.	347/20	2/25 Arms Act.	Civil Lines, Muzaffar Nagar.

[27] Thus, from above it is clear that there are two cases engaging U.P. Gangster Act (I) Case Crime No. 1203 of 2018 u/s 2/3 U.P. Gangsters Act, Police Station Kotwali Nagar, Muzzafarnagar; (II) Case Crime No. 433 of 2020 u/s 2/3 of U.P. Gangsters Act Police station Civil Lines, Muzafarnagar (instant case). From the records, it is born out, that in the earlier

case gang chart of five cases were shown to the credit of the applicant and that is why, he has been bailed out by the bench of this Court on 18.09.2019(Annexure-16). In subsequent case, a gang chart showing only one case (Case Crime No. 306 of 2020 u/s 392/411 IPC Police Station Civil Lines, Muzzafarnagar to the credit of the applicant and thus, as mentioned above, learned counsel for the applicant hammered his submission, relying upon only one case.

[28] These short-comings are sufficient to point out the alleged loopholes in execution of above G.O. dated 24.10.2003 and the G.O. dated 02.01.2004. Clubbing the number of cases of accused-applicant of above two gang charts is 5+1=6 cases in all are to the credit of applicant. Then, from where these numbers were swelled to 15 cases which finds mention in the bail rejection order? There is no proper or satisfactory and explanation to bridge this gap of 15 cases. Why all these cases were not shown in one gang chart in one go? Now, at the stage of bail, the state in order to poison the judicial mind and prejudice the court are giving the details of all these 15 cases. This is the precise question for which this court is extremely bothered and conscious. It is on the part of the alleged laxity by the author of the gang chart and thereafter a blind approval by the higher administrative and police authorities of the District, the harden accused persons, succeeds in getting the bail from the law court.

[29] As mentioned above, the underline idea and objective of U.P. Gangsters Act is to crub the menace of organized crime with iron hands. The provisions of the enactment is targeted against that individual who either singly or by way of a gang is in habit of committing crime listed in sub section 2(b) of the Act. He is dreaded criminal and an incurable disease to the society. By applying the provisions of present enactment, the individual is not prosecuted or punished for those offences which he has committed but he is charged for being habitual, dreaded and harden criminal who commits these offences in much more planned and organized way. It is highly risky to permit such persons to roam around freely in the open society and the innocent persons of society remain on the tentacle hooks so long as the said accused is a free man and posing serious threat to the orderly society. Thus, after applying the stringent provisions of this Act, State has got right to screw such persons, put them behind the bars and attach their ill-gotten money.

[30] Now, reverting back to the facts of the test case. As mentioned above, that two different cases under Gangster Act were fasten against the accused individual, though from two different Police stations of district Muzzafarnagar. In the Gang chart of 2018, five cases were shown and in the instant Gang Chart only one case to his credit but, it is born out from rejection order that he has got 15 cases on his back. In the bail application, the applicant has annexed 13 bail orders granted to him by different law courts on different occasion with his tacit addmission about his involvement but the benevolent informants of both these cases have shown 5+1 cases only. The D.O. Letter of D.G.P. dated 23.10.2003 and G.O. 02.01.2004 indicates that gang chart would indicate only those cases where the charge sheet have been submitted by the police. The said chart would be prepared by concerned S.H.O. of the Police Station and approved by C.O. and, thereafter, S.P./S.S.P. of the concerned district. There is a rider in the said

Government communication that those cases in which earlier gang chart was prepared, shall be discounted in subsequent gang chart. Both the proceedings under U.P. Gangster Act is yet to see its final verdict. As pointed out earlier, that both these gang charts are incomplete and give only partial picture of the facts of the case. This would give rise to a room to the S.H.O./Police Personnels to misuse their power by initiating number of proceedings under above Act time and again. This Court is often experienced such type of lapses and short falls in preparation of the gang chart which contains bare skelton of the cases and their respective numbers on which the gang chart is prepared is in most casual way and thereafter proceedings under U.P. Gangsters Act were initiated by the State.

[31] In the instant case, from the gang chart it is evident that the gang of which the applicant is its active member is mostly operating in district Muzzafarnagar. In the age of internet, computers and other helpful software etc. where information of entire world is on one's finger tips with the additional platforms in the shape of D.C.R.B./S.C.R.B./N.C.R.B./C.C.T.N.S. its operation is very convenient to prepare one's gang chart in extensive way. The callous and careless approach in preparing the gang chart would not only adversely affect the prospects of criminal prosecution against that individual, who are harden criminals but also the very object of the enactment would also go haywire. The accused would have an easy access of the bails from the law courts. Usually, the Court admits on bail either on solitary or lesser number of cases against that accused applicant in his gang chart. In the absence of full and comprehensive information regarding criminal credentials of the individual, it creates extremely ackward situation for the prosecutors even in the law courts but also consume valuable time of the courts while holding archeaological exercise to explore one's criminal antecedents. This is totally unacceptable situation. The Court requires entire "criminal horescope" of the individual of the past who has been charged under the U.P. Gangsters Act .

[32] Such type of incomplete or half backed gang charts is reflective of informant's attitude and, his professional incompetence. Any material lapse in preparing the exhaustive gang chart should be plugged at the earliest and not the stage of bail. Presently, it seems that the informant either does not want to prepare the complete gang chart for any 'particular reason' or 'motive' or he has got lack of information regarding antecedents of particular individual and his modes-operandi. It is true that there shall not be repetition of case crime numbers as it may attract the vice of double jeopardy, but there is no restriction if any "addenda" is added to the gang chart spelling out his previous criminal antecedents. That would be easy for the law courts to fathom the depth and gravity of the individual seeking bail after having holistic and comprehensive picture of the criminal history. The Court expects that the gang chart must give a concrete information not only the crimes committed by him in his individual capacity but also as member of that gang. Besides this, the area of operation i.e. within the district or touching the other districts or even gone beyond the limits of the State. While considering the bail application of that accused, the Courts are also curious to know the stage of trial of other cases in which that individual is enjoying bail. The said gang chart must indicate that as to whether he has misused

his liberty of bail by indulging any other offence after coming out of jail.

[33] The alleged gang is having any expertise in committing any particular type of offence or they are indulged in assorted crimes, their family background, social and financial status including his ill-gotten properties and their reputation in the locality where he normally resides. All these are material particulars, helpful while adjudicating the bail application and also during the trial.

[34] Thus, in nutshell, the Court completely discard the gang chart of accused/applicant Nishant@Nishu with the direction to the S.P. Muzaffar Nagar and informant to re-cast the fresh gang chart, mentioning above details in it, within four weeks and produce them before the Court on the next date in the second week of July, 2021 by way of supplementary affidavit.

[35] Principal Secretary(Homes) Lucknow and the Director General of Police, Lucknow are hereby directed to :-

1). Start exercise to frame proper Rules of the present enactment pursuant to the provisions contained in Section 27 of the U.P. Act 7 of 1986 latest by 31st December, 2021 positively.

2). Meanwhile, issue proper circular to all the SSP/SPs of the District to appoint any officer at least C.O. Rank, be placed in the office of S.P. , either exclusively or with additional charge to become authority concern and author of gang chart of the individual, under the U.P. Gangster Act, 1986 who shall act as Nodal Officer of all the police stations within the District. The alleged gang chart of individual shall be elaborative, comprehensive on giving all the necessary details of that accused viz (i) name, sex, permanent address (ii) Number of total cases to his credit either in his individual capacity or as member of the gang. (iii) If there are successive prosecution under the U.P. Gangster Act, then details of previous cases in the form of "Addenda" (iv) Stage of trial of those cases before the trial court. (v) Family background, his social, financial status of that accused including his ill-gotten wealth. (vi) Whether he has misused the liberty of bail granted to him earlier by the law courts and have indulged in subsequent offences. (vii) Area of operation of that gang within the district alone or in the adjoining districts or has gone beyond the limits of State and lastly types of cases, meaning thereby the gang is having expertise in committing particular type of offence or assorted crimes and lastly his general reputation in the locality. The Court requires a complete, extensive criminal dossier of that individual, with above mentioned particular.

[36] The S.P/S.S.P of the district after making in depth probe and cross-check, regarding authenticity of the gang chart shall approve it after putting his signatures. Any laxity by the authority concern in preparing the gang chart would warrant serious consequences on his own shoulders.

[37] The Special Judge(Gangster Act) which are operational in every Sessions Divisions in the State are also directed to speed up the trial and make all necessary endeavour to conclude the same within a year of submission of its charge sheet. The proceeding under the U.P. Gangster Act shall be given priority over any other trial.

[38] Normally, the Court shuns and avoid to give any advice to the State agency for the initiation of successive

proceedings under the U.P. Gangster Act. It may suffer from the vice of double jeopardy, but in a given and changed circumstances, they may lodge subsequent FIR under the aforesaid Act of 1986.

[39] The Court expects that concern responsible authorities would take the matter on highest priority and frame the rules as expected within time frame.

[40] Let the copy of this order be handed over to learned Registrar General, High Court of Judicature at Allahabad who shall transmit its copies to Principal Secretary(Homes), Director General of Police, Lucknow, all the S.P/S.S.Ps of the District as well as learned Sessions Judge of every Sessions Division to ensure its compliance in letter and spirit within time bound period. All the pending gang chart shall be amended accordingly.

(2021)06ILR A32
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.06.2021

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Crl. Misc. Bail Application No. 16767 of 2021

Rinkaj Yadav ...Applicant
Versus
State of U.P. ...Opp. Party

Counsel for the Applicant:
Sri Ramesh Kumar Shukla, Sri Rohit Nandan Shukla

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

(a) Bail - In view of the nature of evidence, the period of detention already undergone, the unlikelihood of early conclusion of trial and also the absence of any convincing material to indicate the possibility of tampering with the evidence, the applicant may be enlarged on bail. (Para 8)

Application Allowed. (E-8)

List of Cases cited:-

1. Dataram Singh Vs St. of U.P. & anr. (2018) 3 SCC 22

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

1. Heard learned counsel for the applicant as well as learned A.G.A. appearing for the State and perused the record.

2. This application has been filed seeking the release of the applicant on bail in Case Crime No. 19 of 2021, under Section 3(1) of U.P. Gangster and Anti Social Activities (Prevention) Act, 1986, Police Station Ahraula, District Azamgarh.

3. The chief plank of the submissions made on behalf of accused is that in all cases which have been made the basis to impose the provisions of Gangster Act against the accused, he has already been granted bail by the Court. Contention is that the provisions of the Act have been ill-used by the Police in order to perpetuate the detention of the applicant in jail anyhow even though the offence under the aforesaid Act is not made out. Submission is that the applicant is not a gangster and has never acted or conducted himself as such. Counsel for the applicant has also tried to demonstrate that the alleged previous offences which are said to have been committed by the applicant can at the most be said to be stray incident of breach of law having no nexus with the definition of a gangster as has been provided in the Act.

4. Further submission is that as it has been mentioned in paragraph 4 of the affidavit filed in support of the bail

application that the applicant has already been released on bail in Case Crime No. 184 of 2020 on the basis of which the provisions of the Act were imposed, it shall not be much justified to continue the incarceration of the applicant. Submission is also that the applicant is not guilty of having committed any offence under the Gangster Act. It has also been pointed out that the accused is in jail since 08.01.2021 and that in the wake of heavy pendency of cases in the Court, there is no likelihood of any early conclusion of trial.

5. Learned A.G.A. has opposed the prayer for bail but could not dispute the fact of applicant having been released on bail in all the criminal cases which have been shown to be the basis of imposing the provisions of the Act.

6. 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 larger mandate of the Article 21 of the Constitution of India and the law laid down by the Hon'ble Apex Court in the case of Dataram Singh vs. State of UP and another, (2018) 3 SCC 22, this Court is of the view that the applicant may be enlarged on bail.

7. Let the applicant- Rinkaj Yadav, involved in Case Crime No. 19 of 2021, under Section 3(1) of U.P. Gangster and Anti Social Activities (Prevention) Act, 1986, Police Station Ahraula, District Azamgarh, be released on bail on his executing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned on the following conditions :-

(1) The applicant will not make any attempt to tamper with the prosecution evidence in any manner whatsoever.

(2) The applicant will personally appear on each and every date fixed in the court below and his personal presence shall not be exempted unless the court itself deems it fit to do so in the interest of justice.

(3) The applicant shall cooperate in the trial sincerely without seeking any adjournment.

(4) The applicant shall not indulge in any criminal activity or commission of any crime after being released on bail.

(5)The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad or certified copy issued from the Registry of the High Court, Allahabad.

(6) 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

8. It may be observed that in the event of any breach of the aforesaid conditions, the court below shall be at liberty to proceed for the cancellation of applicant's bail.

9. It is clarified that the observations, if any, made in this order are strictly confined to the disposal of the bail application and must not be construed to have any reflection on the ultimate merits of the case.

(2021)06ILR A34
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.04.2021

BEFORE

THE HON'BLE BACHCHOO LAL, J.
THE HON'BLE SANJAY KUMAR PACHORI, J.

Criminal Appeal No. 100 of 2014

Jakir Ali & Anr. ...Appellants
Versus
State of U.P. ...Opp. Party

Counsel for the Appellants:
Sri Rashtrapati Khare, Sri Dharmendra Kumar Singh, Sri Y.C. Yadav

Counsel for the Opp. Party:
A.G.A., Sri Anirudh Upadhyay

(A) Criminal Law - Indian Penal Code, 1860 - Section 302 read with Section 34 - Code of Criminal Procedure, 1973 - Section 161, 162 (2) , Section 313 - Indian Evidence Act, 1872 - Section 32(1) - Conviction - Dying declaration - Illicit relations - Burn injury - Where the dying declaration is found truthful and voluntary, it is not necessary to corroborate the dying declaration by any other evidence. (Para - 16)

Appellants together set fire to deceased by sprinkling kerosene oil, her neck was also tied by a rope - 80% of burn injury - guilty for offence punishable under Section 302 read with Section 34 I.P.C. . - Conviction and sentence awarded to the appellants by trial court.

HELD:- The trial court rightly found the dying declaration , truthful and trustworthy and the circumstances surrounding the dying declaration are clear and convincing, it can be acted upon without corroboration to hold the prosecution successfully proved the charge under Section 302 read with Section 34 I.P.C. against the appellants . The findings of the trial court are based on proper appreciation of the evidence. The injuries on the body of the deceased fully support the prosecution case. Trial court did not commit any error in convicting the appellants.(Para – 102)

Criminal Appeal dismissed. (E-6)

List of Cases cited:-

1. Khushal Rao Vs St. of Bombay, AIR 1958 SC 22

2. Harbans Singh Vs St. of Punjab, AIR 1962 SC 439

3. Tapinder Singh Vs St. of Punjab,1972 SCC 113

4. Laxman Vs St.of Mah., (2002) 6 SCC 710

5. Paniben Vs St. of Guj. (1992) 2 SCC 474

6. Khushal Rao Vs St. of Bombay, AIR 1958 SC 22

7. Harbans Singh Vs St.of Punj., AIR 1962 SC 439

8. Gopal Singh Vs St. of M.P., (1972) 3 SCC 268

9. Ram Bihari Yadav Vs St. of Bihar, (1998) 4 SCC 517

10. Ramilaben Hasmukhbhai Khristi Vs St. of Guj. , (2002) 7 SCC 56

11. Bhajju Vs St. of M.P., (2012) 4 SCC 327

12. Suresh Chandra Jana Vs St.of W.B., (2017) 16 SCC 466

13. St. of U.P. Vs Ram Sagar Yadav, (1985) 1 SCC 552

14. Madan @ Madhu Patekar Vs St.of Mah., (2019) 13 SCC 464

15. Puran Chand Vs St. of Har., (2010) 6 SCC 566

16. Stat. of Raj. Vs Ganwara, (2019) 13 SCC 687

17. Kundula Bala Subrahmanyam Vs St.of A.P., (1993) 2 SCC 684

18. Amol Singh Vs St. of M.P., (2008) 5 SCC 468

19. Mukeshbhai Gopalbhai Barot Vs St. of Guj., (2010) 12 SCC 224

20. Sri Bhagwan Vs St. of U.P., (2013) 12 SCC 137

21. Pradeep Bisnoi Vs St. of Orissa, (2019) 11 SCC 500

22. Ram Bihari Yadav Vs St. of Bihar & ors., (1998) 4 SCC 517

23. Prem Kumar Gulati Vs St. of Har., (2014) 14 SCC 646

24. Satish Chandra Vs St. of M.P, (2014) 6 SCC 723

25. Satpal Vs St. of Har., Criminal Appeal no. 261 of 2021

26. Shudhakar Vs St. of M.P. , 2012 Cr.L.J 3985 (SC)

27. Noor Mohammad Mohd. Yusuf Momin Vs St. of Mah., (1970) 1 SCC 696

28. Balvir Singh Vs St. of M.P., (2019) 15 SCC 599

29. Maqsoodan Vs St. of U.P., (1983) 1 SCC 218

30. Sathi Prasad Vs The St. of U.P., (1972) 3 SCC 613

31. Ram Bihari Yadav & ors. Vs St. of Bihar & ors., (1995) 6 SCC 31

(Delivered by Hon'ble Sanjay Kumar Pachori, J.)

1. This appeal has been preferred by appellants, namely Jakir Ali, Kutti @ Alimunnisha against the judgment and order passed by Additional Sessions Judge, Court No. 1 Sidharthnagar, respectively on 11.12.2013 and 12.12.2013 in Sessions Trial No. 182 of 2011 arising out of case Crime No. 444 of 2011, police station Golhaura, District Sidharthnagar, whereby the appellants have been convicted under section 302 read with section 34 Indian Penal Code (in short "I.P.C.") and sentenced to undergo imprisonment for life and a fine of Rs. 10,000/- each with default sentence of two months.

PROSECUTION CASE

2. The prosecution case in brief as per first information report1 (Ex.Ka.-5), which was lodged on 17.7.2011 at 4:30 a.m. at PS Golhaura, District Sidharthnagar by Mohd. Umar (PW-1) is that his sister Zahida (deceased) was married to Jakir in the year 1992, and out of this wedlock, 6 children were born. Her eldest daughter is about 15-16 years old. About three months prior to the incident, Jakir had kept Kutti as his wife. Jakir used to beat Zahida when she protested about his illicit relations. On the intervening night of 16/17.7.2011, Jakir and Kutti together set fire to Zahida by sprinkling kerosene oil, her neck was also tied by a rope. Anwar Ali (not examined) and Mohd. Salim (PW-2) and many other people had come on the spot upon hearing the cries of his sister and after saving her, informed him about the incident. He took Zahida to Etwa Hospital with the help of the other villagers, then she was referred to District Hospital Siddharthnagar for treatment, his sister was undergoing treatment.

3. The informant (PW-1) on receiving information, reached on the spot and brought the injured to C.H.C2. Etwa, for treatment at 2:00 a.m. on 16/17.7.2011. Dr. V. K. Vaid (PW-4) examined the injured and prepared a medical report (Ex.Ka.-4). He found two injuries on her body, first; a ligature mark all around on the neck, second; superficial to deep burn wound was present on the whole of the back, both thighs, right leg, both upper arms and

forearms, both hands, and some part of the chest, the upper part of the abdomen, 80% of burn injury. A smell of kerosene oil was present on her body. He informed the police and after giving first aid, referred the injured to the District Hospital Siddharthanagar for further treatment, wherein a dying declaration of injured Smt. Zahida was recorded by Guru Saran Lal (PW-7), Executive Magistrate/Naib Tehsildar, between 1:50 p.m. to 2:00 p.m. on 17.7.2011 in the presence of Emergency Medical Officer3 (not examined).

4. The FIR dated 17.7.2011 (Ex.Ka-5) was registered as case Crime no. 444 of 2011 under section 307 I.P.C. against the appellants at PS Golhaura, District Sidharthnagar at 16:30 hours by CP-233 Ram Sumer Yadav (PW-5), on the basis of a written complaint (Ex.Ka-1) of Mohd. Umar (PW-1). The distance between the place of occurrence and the Police Station is about 12 Km.

5. On 18.7.2011, S.I. Satanand Panday (PW-8/investigating officer4) arrested the appellant Jakir Ali, and on 19.7.2011, after inspecting the place of the occurrence, as pointed out by the informant (PW-1) and his relatives, he prepared a site map (Ex.Ka-10) of the place of the incident. He also recovered an empty bottle of kerosene oil, burnt clothes of the injured Smt. Zahida on 19.7.2011 and prepared a seizure memo (Ex.Ka-16).

6. The proceeding of the inquest was conducted at 1:30 p.m. on 23.7.2011 by S.I. Bhawani Prasad Upadhyay (not examined) on the basis of information of death received through ward boy Surendra Gaur (not examined) at PS-Kotwali Nagar, District Sidharthnagar, which had been endorsed at G.D. Report no. 20 time 11.20 a.m. on 23.7.2011, at the Mortuary of District Hospital Sidharthnagar, an inquest report (Ex.Ka-3) was prepared. S.I. Bhawani Prasad Upadhyay also prepared other police papers (Ex.Ka-12 to Ex.Ka-15) for getting conducted a post-mortem of the body of the deceased.

7. PW-6 Dr. R.K. Verma conducted the post-mortem examination of the body of the deceased on 23.7.2013 at 3:30 p.m. The post-mortem report (Ex.Ka.-8) disclosed the presence of the following ante-mortem injuries on the corpse of Smt. Zahida (aged about 38 years). These are as under:

A- Superficial to deep burn grade I and II injuries present on whole back, below the chest whole abdomen, whole right lower limb from thigh to foot sole, whole left limb (front and back) above knee total burn injury is 60%.

B- Puss was present here and there.

C- Redness in the shape of lines is present.

The doctor opined that he conducted the post-mortem of the dead body of Smt. Zahida Khatoon, which was brought in a very critical condition. The deceased was a simple height saddle, aged about 38 years, her mouth and eyes were half-opened, rigor mortis was present on all four limbs. The right chamber of heart was full and the left chamber was empty, 100 gms undigested food was found in the abdomen, the cause of death was septicemia and shock, which was caused due to burning and infection.

8. During the treatment, Zahida died on 23.7.2011 due to the burn injuries received in the incident. On 24.7.2011, after receiving the written information

(Ex.Ka.-2) of the death of Smt. Zahida by the informant (PW-1), Section 302 I.P.C was added.

9. On 27.7.2011, during the investigation, PW-8 S.I. Satanand Pandey received the medical report of the deceased and information regarding the surrender of appellant Kutti @ Alimunnisha before the court. After completion of the investigation, he submitted a charge sheet (Ex.Ka-11) against the appellants under Sections 302 I.P.C. on 10.8.2011. The court took cognizance of the same. On committal, the trial court framed charges against the appellants under Sections 302 read with Section 34 I.P.C. The appellants denied the charges and claimed trial.

10. To prove the charges against the appellants, the prosecution examined as many as 8 witnesses. PW-1 Mohd. Umar, informant/brother of the deceased, who had arrived on the spot after receiving the information of the incident through mobile call and took the injured Zahida to C.H.C. Etwa; PW-2 Mohd. Salim, neighbour of the deceased who had reached the place of occurrence immediately after hearing the cries of the injured; PW-3 Amirullah, witness of the inquest report; PW-4 Dr. V. K. Vaid, who examined the injured Zahida on 17.7.2011 at 2:00 a.m.; PW-5 CP 233 Ram Sumer Yadav (scribe); PW-6 Dr. R. K. Verma, who conducted the post-mortem; PW-7 Guru Saran Lal, Executive Magistrate/Naib Tehsildar, who recorded the dying declaration of the deceased and PW-8 S.I. Satanand Pandey (I.O.) to prove the exhibited documents. The inquest report (Ex.Ka.-3) and other police papers (Ex.Ka-12 to Ex.Ka-15) were prepared by S.I. Bhawani Prasad Upadhyay, which have been proved by PW-8 S.I. Satanand Pandey as secondary evidence.

11. After taking the evidence of the prosecution witnesses, as per the Section 313 of Code of Criminal Procedure, 1973 (in short 'Cr. PC.') the appellants were questioned about the evidence led against them by the prosecution, wherein they denied the incriminating evidence put to them and stated that they had been falsely implicated on account of enmity. The appellant Jakir Ali stated that he got married to Kutti after the consent of Zahida and before the incident, he had transferred his share of the ancestral property to the children of Zahida. The appellant Kutti stated that on Zahida's consent, she used to live with Jakir and due to this reason, she had been implicated in this case. The appellants examined DW-1 Juber Ali (son of the deceased) in their defence.

12. Before the trial court, the appellants argued that PW-4 Dr. V. K. Vaid examined the injured as accidental injury and endorsed in 'Accidental Register' because the deceased had received the injuries in an accident; the FIR has been lodged after a 16 hours' unexplained delay; the dying declaration was not recorded in question-answer form and words spoken by the deceased, and the doctor, who was present at the time of recording the dying declaration, had not been examined; children of the deceased, who were sleeping on the adjacent cot to the deceased, had not been examined.

FINDINGS OF THE TRIAL COURT

13. The trial court found that PW-2 Mohd. Salim witnessed the incident because he reached the spot immediately after hearing the hue and cry. He saw accused persons Jakir and Kutti running away from the place of the incident after

the occurrence and Zahida told him that Jakir and Kutti set her to fire after tying her neck with a rope, set her on fire by sprinkling kerosene oil on her body. The medical report also corroborates the prosecution case.

14. The trial court observed that though there is a discrepancy between the medical report and the post-mortem report of the deceased about the presence of a ligature mark over the neck of the deceased, there is a possibility that after 7 days of her treatment, ligature mark would have faded on the neck of the deceased.

15. The trial court further found that the smell of kerosene oil was present on the body of the injured Zahida during her medical examination, immediately after the incident and a bottle of kerosene oil was recovered from the spot. This is an admitted fact that, before the occurrence, there was a dispute between Jakir and the deceased, due to Jakir's illicit relation with Kutti.

16. The trial court further found that the credibility of the dying declaration is not affected by not examining the doctor, who was present at the time of recording the dying declaration of the deceased, as a witness because PW-7 Gur Saran Lal stated that the doctor was present at the time of recording the statement of the deceased. It is settled by the Apex Court that where the dying declaration is found truthful and voluntary, it is not necessary to corroborate the dying declaration by any other evidence. The trial court concluded that the prosecution successfully proved the charges against the appellants under Section 302 read with Section 34 I.P.C., on the basis of the dying declaration beyond reasonable doubt and thereby convicted and sentenced the appellants as above.

17. Being aggrieved by the trial court's judgment and order, the appellants have preferred this appeal.

SUBMISSIONS BEFORE THIS COURT

18. We have heard Sri Dharmendra Kumar Singh, learned counsel for the appellants; Sri Ratan Singh, learned A.G.A., for the State; and Sri Anirudh Upadhyay, learned counsel for the informant and have perused the record.

19. Learned counsel for the appellants vehemently urged that *Firstly*; the dying declaration of the deceased was a result of tutoring and prompting because of PW-1 Mohd. Umar and his two other sisters were present in the hospital before recording the dying declaration. It is submitted that the possibility of tutoring the injured Zahida so as to make statement against the appellants cannot be ruled out. The dying declaration was not free, truthful and voluntary. Secondly; the prosecution failed to prove that the injured was in a fit state of mind and condition at the time of recording the dying declaration because the doctor, who gave the certificate about the fit condition of the deceased, has not been examined and even PW-7 Guru Saran Lal had not asked any question to the injured whether she was in a fit state of mind and having a good mental condition. The credibility of the dying declaration is affected because it was not recorded in a question-answer form and in the word spoken by the deceased. Thirdly; there are inconsistencies between the oral statements of the deceased as stated to PW-1 Mohd. Umar, PW-2 Mohd. Salim and PW-8 S.I. Satanand Pandey (I.O.) purported oral dying declarations, one hand and written dying declaration of the deceased recorded by PW-7 Guru Saran

Lal, on the other hand; the first set attributed the active role to both the appellants in the incident, whereas, as per the written dying declaration, the active role has been assigned only to the appellant Jakir Ali. Fourthly; Zahida received burn injuries in an accident because PW-1 Mohd. Umar told Dr. V.K. Vaid (PW-4) at 2:00 a.m., and for this reason, the medical report (Ex.Ka.-4) had been endorsed in the 'Accidental Register' and not in the 'Medico-Legal Register'. At the time of the medical examination, injured Zahida was conscious, crying and having the opportunity to tell the doctor about the incident but she did not give any statement. Fifthly; PW-1 lodged the FIR after 15 hours of an unexplained and unreasoned delay. The appellants have been falsely implicated due to the enmity of the second marriage of the appellant no. 1 Jakir Ali. Sixthly; The dying declaration has been appreciated by the learned trial court without any corroboration, therefore, the prosecution has failed to prove the case against the appellants beyond all reasonable doubts. Hence, the impugned judgment and order are liable to be set aside.

20. **Per Contra**; learned A.G.A. submitted that PW-7 Guru Saran Lal, Executive Magistrate/Naib Tehsildar recorded the dying declaration of the deceased in presence of a doctor after obtaining a certificate with regard to the fit state of mind and condition of the deceased. There is no inconsistency between the oral dying declarations and the written dying declaration of the deceased. Both the appellants carried out the incident in a planned manner when the deceased was sleeping with her two young children on the roof of the house. To stop the deceased from making a noise, her neck was tied with a rope, then kerosene oil was poured over her body, burnt her while she was asleep and the appellants fled away. PW-2 Mohd. Salim as neighbour and an independent witness, who reached at the spot within a minute of the incident, saw the appellants running away from the spot. Learned trial court has rightly held the appellants guilty; the findings recorded by the trial court are on appreciation of the evidence, which is neither perverse nor contrary to the evidence on record; the charges levelled against the appellants had been proved beyond reasonable doubts. Thus, their conviction and sentence do not warrant any interference. The judgment and order of the trial court is liable to be affirmed. A prayer was, therefore, made to dismiss the appeal.

21. Learned counsel for the informant Sri Anirudh Upadhyay adopted the submissions made by learned A.G.A.

ANALYSIS OF THE PROSECUTION EVIDENCE:

22. Before we proceed to consider the respective submissions, it would be appropriate to notice the arguments on behalf of the appellants in detail. The appellants' arguments are: Firstly; the deceased received injuries in an accident, after concealing this fact, the FIR has been lodged after recording the dying declaration with consultation and deliberation after about 15 hours an unexplained delay of the incident by PW-1 Mohd. Umar, which emerges from the following circumstances:

(a) Medical report (Ex.Ka.-4) of the injured was endorsed in the accidental register by PW-4 Dr. V.K. Vaid, on the instance of PW-1 Mohd. Umar, who brought the injured for treatment at C.H.C. Etwa at 2:00 a.m. on 17.7.2011 and PW-4

Dr. V. K. Vaid examined the injured. At that time the injured was conscious and crying, but deceased did not tell anything to the doctor (PW-4) regarding the incident.

(b) The theory of strangulation is failed because as per medical report (Ex.Ka.-4) injury No. 1 is found as a ligature mark around the neck of the deceased but this ligature mark was not found at the time of the post-mortem.

(c) Two children Rehana (aged about 18 years) and Babbu (aged about 14 years), who were sleeping adjacent to the deceased on another cot and saved the deceased after the incident, were not questioned by the investigating officer and have also not been examined by the prosecution.

(d) The mattress on which the injured was sleeping at the time of the incident and rope by which it was alleged that the appellant Jakir had tied the neck of the deceased, were not recovered during the investigation.

(e) The FIR of the instant case was registered at 16:30 hours on 17.7.2011; The investigating officer PW-8 inspected the spot on 19.7.2011 and recovered a bottle of kerosene oil from the spot, the investigation of the present case was not started promptly, and incriminating articles were recovered on the third day of the incident, alleged recovery loses its importance on account of the delay.

Secondly; there is a discrepancy with regard to the involvement of the appellant Kutti in the incident between the oral statements of the injured as told to PW-1 Mohd. Umar, PW-2 Mohd. Salim and PW-8 S.I. Satanand Pandey (I.O.) on one hand and dying declaration (Ex.Ka.-7) recorded by PW-7 Guru Saran Lal, on the other hand. In support thereof, it has been pointed out that:

(a) PW-1 Mohd. Umar and PW-2 Mohd. Salim have attributed the active role to both the appellants Jakir Ali and Kutti in the incident as they stated that Jakir and Kutti together set fire to Zahida by sprinkling kerosene oil on her body and her neck was also tied by a rope; whereas, as per the dying declaration (Ex.Ka.-7), the appellant Kutti has not attributed any role in the incident. According to the dying declaration, her husband came to the roof and poured kerosene oil on her body, after which he tried to kill her by tying a rope around her neck, then he lit a matchstick and set fire on her clothes.

Thirdly; The injured was not in a fit state of mind and condition at the time of recording the dying declaration recorded by PW-7 Gur Saran Lal because:

(a) The doctor, who gave the certificate about the fit condition of the deceased at the time of recording the dying declaration was not examined;

(b) PW-7 Guru Saran Lal did not ask any question to the injured at the time of recording her statement as to whether she was in a fit state of mind and had a good mental condition.

Fourthly; The dying declaration was a result of tutoring, prompting and imagination and was not free, truthful and voluntary. The credibility of the dying declaration is affected because:

(a) The dying declaration was recorded after a delay of 12 hours to the incident.

(b) The dying declaration was not recorded in question-answer form and the word spoken by the deceased.

(c) The informant and his two other sisters were already present in the hospital on 17.7.2011 with the injured before recording the dying declaration.

23. Before we proceed to dwell upon the merit of the contentions raised before us, it will be apposite to have close scrutiny of the entire ocular evidence, which is as follows:-

24. **PW-1** Mohd. Umar (aged about 46 years) stated in his examination-in-chief that Zahida was his real sister, she was married to Zakir in 1992, out of this wedlock 6 children were born. About three months ago, Jakir had kept Kutti as his wife. Whenever his sister protested, Jakir used to beat Zahida. For this reason, on yesterday night 16/17.7.2011, both Jakir and Kutti together tried to kill her by tying a rope around Zahida's neck, then setting her ablazed by pouring kerosene oil. Many people had witnessed the incident and informed him about the same. On getting the information, he reached the spot and saw his sister excessively burnt. He took Zahida to Etwa Hospital then to Siddarthanagar Hospital for treatment. During the treatment, the Magistrate recorded Zahida's statement. Zahida died in the hospital.

25. PW-1 further stated in his statement-in-chief that before this incident, Jakir had threatened several times to kill his sister. On 7.6.2011 and 14.7.2011, Zahida gave information to the police about the danger to her life. Even 10 days before the incident in question, Jakir had beaten Zahida, her father-in-law had informed the police on 25.6.2011 about the incident. In this regard, a written compromise was prepared. His sister had given all the documents to him before her death.

26. PW-1 Mohd. Umar in his cross-examination stated that his village is 1 Km away from village-Bahuti. The call for information about the incident was received by his wife so he could not tell as to who had informed him about the incident. This information was received at night, it is not known at what time the information was received. He reached the spot at night. Abdul Mannan went with him. When he reached the spot, the whole village was gathered. At that time, his sister was standing in the verandah (Oasara), people were supporting her. He did not ask his sister about the burning and neither did anyone tell him. Zahida had told him about her burning, this fact has not been written in the report. He had told the investigating officer, if it is not written in his statement, he cannot disclose the reason.

27. He further stated in his cross-examination that he first took Zahida by car to Etwa Hospital, she was crying and cursing. She stayed in the Etwa Hospital for about an hour and was then referred to district hospital Siddharthnagar for treatment. He reached the district hospital along with the injured early in the morning. During her admission to the district hospital, he stayed there, sometimes, he used to go to home. He does not remember after how many days, he left the hospital for the first time. On the day, his sister was admitted to the hospital, he had also gone to the police station leaving Zahida under the supervision of his two other sisters.

28. PW-1 stated further in his cross-examination that the eldest daughter of his sister is sixteen years old and the youngest child must be five years old. He could not see the children at the place of the occurrence because there were many people present. At that time, he did not find the children.

29. The following suggestions have been asked from this witness.

It is wrong to say that there was no love affair between Jakir and Kutti. It is wrong to say that he had told the doctor that his sister was accidentally burnt. It is wrong to say that Zahida is accidentally burnt. It is wrong to say that for this reason, the report was written late. It is wrong to say that he wants to marry his son to the daughter of Jakir and he had attempted many times. It is wrong to say that he and his two sisters had put pressure on Zahida, saying that if she does not give statements according to them, they would not provide treatment to her. It is wrong to say that because of the above reasons, he and his two sisters had pressurized Zahida for giving a false statement. It is wrong to say that no application has been given before the incident.

30. It is noteworthy that on behalf of the appellants, no question was put to the witness about how the accident took place. This fact is not disputed that the deceased told the witness about the incident. No suggestion was asked about the oral dying declaration made by the deceased to this witness. These facts that Jakir had beaten Zahida 10 days before the incident, and he had threatened several times to kill Zahida, are also not disputed. It is significant that without disputing the fact of tutoring by PW-1, the suggestion of tutoring to the deceased was asked to the witness. On behalf of the appellants, neither the time of the incident was disputed nor any suggestion on this fact was made. There is no dispute regarding the source of light to identify the appellants at the time of the incident by the deceased.

It is noticeable that the appellants did not contradict the fact that the deceased had told PW-1 about her burning, whereas PW-8 S.I. Satanand Pandey (I.O.) stated that PW-1 Mohd. Umar told him about the deceased's oral statement regarding the incident.

31. **PW**-2 Mohd. Salim (aged about 33 years) stated in his statement-in-chief that Kutti is the daughter of Hussaini of the village, Jakir had an illicit relation with Kutti. Zahida was unhappy about this and for this reason, he used to beat her up. Panchayat was also held regarding their illicit relation.

32. PW-2 Mohd. Salim stated further in his examination-in-chief that the incident took place at midnight, about one and half years ago. At that time he was lying on his roof. After hearing the cries of Zahida, he rushed to the spot, and at that time, other people were also present there. He saw Jakir and Kutti running away. Zahida was burning, he pulled the burning clothes of Zahida and covered her body with a bedsheet. At that time, Zahida told him that Jakir and Kutti tied a rope around her neck and poured kerosene oil on her, and set her ablaze. He informed Zahida's brother about the incident from his mobile.

33. PW-2 Mohd. Salim in his cross-examination stated that Jakir used to live with Kutti, in Kutti's house, which is situated outskirts of the village, about five hundred steps away from Jakir's house. There was a dispute between Jakir and Zahida due to his illicit relation with Kutti, which had been going on for five to six years. Zahida was living in Jakir's house and her father-in-law was maintaining her house.

34. PW-2 Mohd. Salim in his cross-examination further stated that the place of incident is ten steps away from his house, there is no other house situated between his

house and the place of incident. It would have taken him about half a minute to reach on the spot after hearing the cries. He was not aware whether the main door of Zahida's house was open or not at that time. Zahida was sleeping on the roof of a two-storeyed house. When she was coming downstairs and only two steps were left to come down, the fire was visible on her body. He put a bedsheet over her. Zahida's hands and feet were burnt. He was not aware as to what other parts of her body had been burnt. The mattress on which, she slept was burnt. Zahida's brother reached the spot within ten minutes after the incident. The village Bagulhawa is less than one Km from the spot. Zahida's brother took her to the hospital.

35. He further stated in his cross-examination that Zahida's two children, Rehana (aged about 18 years) and Babbu (aged about 14-15 years) were crying and screaming after seeing their mother. Rehana and Babbu were present on the spot before he arrived. The other four children were sleeping outside in the Sahan. He does not know whether Zahida's children, who were sleeping in a Sahan (front courtyard) had any woman or man sleeping there. He is Jakir's neighbour. Jakir had contested the election of village Pradhan. He does not know that after Jakir's marriage with Kutti what did his father do about the property of Jakir. Jakir had a licensed weapon.

36. On behalf of the appellants, only one suggestion was asked from this witness that it is wrong to say that he has given false evidence due to the enmity of the village election, without disputing the fact of aforesaid enmity.

37. It is important to note that the appellants have not disputed the material facts of his testimony: firstly; the incident took place at midnight on 17.7.2011, he had reached the spot within a minute after the incident and at that time there were many other villagers present, secondly; he had saved the deceased after the incident and the deceased had told him about the incident, thirdly; he had seen the appellants running away from the place of the incident, fourthly; Jakir had illicit relations with Kutti and a Panchayat was held about the illicit relations between the appellants, sixthly; he informed Zahida's brother about the incident from his mobile. Significantly, there is no dispute regarding the source of light to identify the appellants at the time of the incident by the deceased.

38. **PW-3** Ameerullah (witness of the inquest report) in his examination-in-chief stated that Zahida was his maternal sister and the inquest report was prepared in his presence. He stated in his cross-examination that the body was sealed so, he could not see the dead body.

It would be appropriate to notice that there is no dispute with regard to the identification of the body of the deceased in the instant case.

39. **PW-4** Dr. V. K. Vaid stated in his examination-in-chief that he had examined the injuries on Zahida's (aged about 37 years) body on 17.7.2011 at 2:00 a.m., whom his brother Mohd. Umar had brought to the hospital. The following injuries were present on her body.

(1) A ligature mark around the neck about 1 cm breadth x 30 cm all around on the neck, red in colour, glistering present

from the occipital bone on the back and in front hyoid cartilage involved circular.

(2) Superficial to deep burn of the whole of the back, both thigh, right leg, both upper arms and forearms, both hands, and some part of the chest, the upper part of the abdomen.

A smell of kerosene oil was present. Face, head, left leg, some part of the chest, and perineum not involved.

40. PW-4 Dr. V.K. Vaid further stated in his examination-in-chief that injury no. 1 (strangulation) was dangerous to life, red in colour and fresh, and injury no. 2 was a flame burn about 80%. He had informed the police. The injured was referred to the District Hospital Siddharthnagar for further treatment after giving first aid.

41. PW-4 Dr. R. K. Vaid in his cross-examination stated that the medical report has been endorsed in the accidental register. Mohd. Umar said that she was burnt. He did not ask Zahida as to how she was burnt, he had also not asked about her burning. At that time she was groaning and screaming. The ligature mark was present on the lower part of the occipital bone.

42. It is noteworthy that the injured was brought to C.H.C. Etwa immediately after the incident, at that time the injured was groaning and screaming. A ligature mark was found all around the neck of the injured and 80% of burn injures were found on the body of the injured. Significantly, the appellants have not disputed the above injuries found on the body of the injured and it has also not been disputed that why he informed the police while he endorsed the injuries in the 'Accidental Register'. The question has not been asked to this witness if a ligature mark on the neck and 80% burn injuries could occur in the accident. It would be appropriate to highlight the fact that PW-1 Mohd. Omar had only told PW-4 about the burn and had not disclosed as to how she received the burn injuries.

43. **PW-5** CP 233 Ram Sumer Yadav (scribe) in his statement-in-chief stated that he had registered the FIR as Case Crime no. 44 of 2011 under Section 307 IPC at PS Golhaura District Sidharthnagar on the basis of the informant's written complaint and endorsed it in G.D. Report No. 20 at 16.30 hours.

44. PW-5 CP Ram Sumer Yadav in his cross-examination stated that the time of the incident in Chik FIR is written according to the complaint. Time has not been disclosed in the written complaint of the informant.

45. At this stage, it would be appropriate to highlight that as per the complaint (Ex.Ka.-5), the incident took place on the intervening night of 16/17.7.2011 on the roof of the two-storeyed house of the appellant Jakir Ali. It is noteworthy that the appellants have not disputed the timing of the incident to Mohd. Umar (PW-1).

46. **PW-6** Dr. R. K. Verma, who conducted post-mortem in his examination-in-chief stated that on 23.7.2011 at 3:30 p.m. he conducted the post-mortem of the dead body of Zahida Khatoon, which was brought in a very critical condition. Deceased was simple height saddle, aged about 38 years, mouth and eyes were half-open, rigor mortis was present on all four limbs. He found the following injuries:

A- Superficial to deep burn grade I and II injuries present on whole back,

below the chest whole abdomen, whole right lower limb from thigh to foot sole, whole left limb (front and back) above knee total burn injury is 60%.

B- Puss was present here and there.

C- Redness in the shape of lines is present.

PW-6 stated in his cross-examination that no sign of strangulation was found on the body of the deceased.

47. It is noteworthy that in the medical report (Ex.Ka.-4) prepared at 2:00 a.m. on 17.7.2011, wherein a ligature mark was found all around the neck of the deceased. The post-mortem was conducted on 23.7.2011 at 3:30 p.m. after 6 days 13 hours and 30 minutes after the medical examination. The appellants have not put any question on the above opinion about the nature of the ligature mark.

48. **PW-7** Guru Saran Lal (Naib Tehsildar/who recorded dying declaration) in his examination-in-chief stated that he recorded the dying declaration of Zahida (aged about 37 years) on 17.7.2011 at District Hospital Sidharthnagar. Before taking the statement, he had taken a certificate from the doctor to the effect that Zahida was able to give her statement. He had written whatever Zahida told him. Zahida had put her thumb impression after reading and listening her statement. After taking the statement, he took another certificate from the doctor about the mental condition of the injured during and after the statement.

49. PW-7 Guru Saran Lal in his cross-examination stated that the place where the statement was written, is not mentioned in the statement. He did not ask the injured about her name and her mental condition. At that time, there was no one present besides the doctor and the injured. He had taken the thumb impression of the injured.

It was suggested that it is wrong to say that he has not recorded any statement of the deceased, he prepared the statement on the direction of the informant.

50. It is noteworthy that the appellants have not disputed the facts: *firstly*; this witness recorded the dying declaration of Zahida after obtaining the certificate of the doctor, *secondly*; the doctor endorsed that the injured was in a fit state of mind after and during recording the statement, *thirdly*; at the time of recording the dying declaration, only three persons i.e. this witness, injured and the doctor were present there, fourthly; the mode of the recording of the dying declaration, fifthly; about the statement as stated by the deceased and her mental condition at the time of recording her statement.

It is also significant that no suggestion was asked to this witness about the narration of the incident as stated by the injured and the mental condition of the injured.

51. **PW-8** S.I. Santanand Pandey (I.O.) deposed that he started the investigation of Case Crime No. 444 of 2011 on 17.7.2011, he arrested Jakir on 18.7.2011. On 19.7.2011, he recorded the statement of the injured Zahida, informant Mohd. Umar, Anwar, Mohd. Salim and he prepared the site plan after inspecting the incident place on the instance of the informant and his relatives. After the death of Zahida, on 24.7.2011, Section 302 I.P.C. was added by S.I. Shiv Charan Yadav, on that day he was on leave. He received the inquest report of Zahida on 27.7.2011 and was informed about the surrender of Kutti

on the same day. He received the post-mortem report on 31.7.2011 and submitted the charge sheet before the court on 10.8.2011. He proved the inquest report and other police papers, which have been prepared by S.I. Bhawani Prasad Upadhyay, as secondary evidence respectively as Ex.Ka.-3, Ex.Ka.-12, Ex.Ka.-13, Ex.Ka.-14, Ex.Ka.-15.

52. PW-8 S.I. Santanand Pandey in his cross-examination stated that he did not question the children of Zahida. Her children were indeed residing with her. The children of the deceased were sleeping there at the time of the incident but no inquiries were made to the children regarding the incident because they were young. He had questioned the eldest daughter of the deceased but did not record her statement. It is true that Rehana the eldest daughter of the deceased was about thirteen years old.

53. He further in his cross-examination stated that during the investigation, he found some signs of burning at the place of the incident. He depicted the point 'A' in the site plan, where the burning mattress and clothes were found. There was blackening on the adjoining wall of the place of incident, which resulted from the smoke, but it has not been shown in the site plan. He questioned Abul Haleem, Nur Mohd., who lived near the place of the incident, he did not take Rahish's statement, because he was not present there. Mohd. Umar told him that his sister told him about her burning when he reached the spot. He knew during the investigation that Jakir used to come to the house of the deceased and also that he resided in some other place.

It is suggested by the appellants that it is not correct to say that he had not recorded the statement of children because they knew the real facts.

54. It is noteworthy that the appellants have not disputed the oral statement of the injured Zahida, which has been recorded during the investigation on 19.7.2011 under section 161 of Cr. PC. There is no dispute about the fact that Mohd. Umar (PW-1) told that his sister told him about her burning. It is noticeable that this witness has not stated anything in his examination-in-chief about the incident as recorded under Section 161 Cr. PC.

55. At this stage, It would be appropriate to mention the dying declaration of the Smt. Zahida was recorded by PW-7 Gur Saran Lal between 1:50 p.m. to 2:00 p.m. on 17.7.2011, reads as under:

"Patient is sound mental condition for statement

Sd-
17.7.11
1:50 p.m.
(E.M.O.5)
Distt. Hospital
Sidharthnagar

मै जाहिदा खातून पत्नी जाहिद अली उम्र लगभग 37 वर्ष मुसलमान (मनिहार) ग्राम बहुती थाना गोल्हौर बहलफ बयान करती हूं कि आज रात 1.30 बजे घर के दूसरे मंजिल छत पर सोई थी बगल के चारपाई पर 2 बच्चे सो रहे थे 4 बच्चे नीचे सोये थे। मेरा पति छत पर उस समय आया तथा मिट्टी का तेल मेरे शरीर पर डाल दिया तथा मेरे गले में रस्सी लगाकर कस दिया उसके बाद रस्सी खींच कर मार डालने की कोशिश किये तथा माचिस जलाकर मेरे कपड़े में आग लगा दिये मै जलने लगी। मेरे शोर मचाने पर मेरा आदमी जाकिर व उसकी दूसरी औरत कट्टी पुत्री हुसेनी नि0 ग्राम बहुती मुझे छोडकर भाग गये उसके बाद मेरे बच्चे तथा गांव के लोग आकर मुझे बचाये तथा फोन करने पर मेरे भाई आकर मुझे लाकर अस्पताल मे भर्ती किये मुझे जलाकर मारने की नियत से मेरा आदमी जाकिर पुत्र अब्दुल्ला व उसकी दूसरी औरत कुट्टी ने इस घटना को अन्जाम दिया इसमें दोनो दोषी है। ब्यान सुनकर तस्दीक किया।"

ब्यान अंकित किया
नि0 अं0 जाहिदा खातून
ह0 अप0
17.7.11
एन0 टी0 2.00 पी0 एम0

Patient was in sound mental condition during and after statement.

Sd-
17.7.11
2:10 p.m.
(E.M.O.)
Distt. Hospital
Sidharthnagar

56. The translated version of the dying declaration is as follows:

"I Zahida Khatoon wife of Zakir Ali, aged about 37 years Muslim (Manihar) village Bahuti police station, Golhaura, said on oath that tonight at 1:30 a.m., she slept on the roof of the two-storied house two children were sleeping on the adjacent cot, four children slept on the ground floor. My husband came to the roof at that time and poured kerosene oil on my body and tightened my neck with a rope around my neck and tried to kill me by tying the rope and set fire to my clothes by burning matchstick. I started burning. After upon making hue and cry by me, my husband Jakir and his other woman Kutti daughter of Hussaini resident of Bahuti fled away leaving me alone, after that my children and people of the village saved me, and on call, my brother who came and admitted me to the hospital. My husband Jakir son of Abdullah and another woman Kutti carried out this incident, both of them are guilty.

57. **DW-1** Juber Ali (aged about 15 years, son of the deceased) stated in his examination-in-chief that on the night of the incident, he and his sister Rubina slept on the roof with his mother. His eldest sister and the other three sisters were sleeping on the ground floor. The night before the incident, after asking his mother, he went to the toilet, which is located on the ground floor and he slept there. After half an hour, he heard cries of his mother "Bachao Bachao" and she came down screaming. After that, the people of the vicinity had come. He had not seen anyone on the roof of the house. His father got married to a girl from the village, whose house is situated in the village. His father lived in Bombay and when he came, used to live with his second wife. His mother and his sister lived with him in the house.

58. DW-1 Juber Ali in his statement-in-chief stated further that his maternal uncle had brought his mother to a hospital with a cloth. He went to the hospital with his grandmother and grandfather 2 or 3 days later. He saw his maternal uncle and his mother were talking but could not hear properly. He did not hear his maternal uncle telling his mother that if she did not say as told, he would not get her treated.

59. DW-1 Juber Ali stated in his cross-examination that his father kept Kutti. It is right to say that due to Kutti, there was a dispute between his parents. He did not see how the mother caught fire. But he woke up soon after the mother was set on fire. He is studying in class 8th.

60. It is noteworthy that DW-1 Juber Ali did not say anything about the injuries sustained by the deceased in the accident; the tutoring and prompting by the near relatives of the deceased before the dying declaration, and also about the presence of the appellants in the house of the incident before the occurrence. Inspite of that, it is

disputed on behalf of the appellants that the children have not been deliberately included in the investigation and trial.

61. Now we shall weigh the argument of learned counsel for the appellants that the prosecution has failed to prove the fit state of mind of the deceased at the time of the recording of her dying declaration. The dying declaration (Ex.Ka.-7) was not recorded in a question-answer form and in the words spoken by the deceased. It was a result of tutoring, prompting and imagination and should not be acted without its corroboration.

It is noticeable that it was suggested to PW-1 Mohd. Umar that there was no love affair between Jakir and Kutti; whereas, to the contrary, DW-1 stated in his examination-in-chief that his father got married to Kutti, and his father used to live with his second wife.

62. Before we analyse the prosecution evidence it would be important to note certain case laws with regard to the importance, acceptability, reliability, and admissibility of a dying declaration. The law on the subject has been clearly and explicitly enunciated by the Apex Court in various judgments. In **Khushal Rao v. State of Bombay AIR 1958 SC 22** where His lordship B.P. Sinha J., observed as: (AIR, p. 28-29, para 16 and 17)

"16. On a review of the relevant provisions of the Evidence Act and of the decided cases in the different High Courts in India and in this Court, we have come to the conclusion, in agreement with the opinion of the Full Bench of the Madras High Court, aforesaid, (1) that it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated; (2) that each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made; (3) that it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other pieces of evidence; (4) that a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence; (5) that a dying declaration which has been recorded by a competent magistrate in the proper manner, that is to say, in the form of questions and answers, and, as far as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human, memory and human character, and (6) that in order to test the reliability of a dying declaration, the Court has to keep in view the circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night; whether the capacity of the man to remember the facts stated, had not been impaired at the time he was making the statement, by circumstances beyond his control; that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties.

17. Hence, in order to pass the test of reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused who

had no opportunity of testing the veracity of the statement by cross-examination. But once, the Court has come to the conclusion that the dying declaration was the truthful version as to the circumstances of the death and the assailants of the victim, there is no question of further corroboration.

If on the other hand, the Court, after examining the dying declaration in all its aspects, and testing its veracity, has come to the conclusion that it is not reliable by itself, and that it suffers from an infirmity, then, without corroboration it cannot form the basis of a conviction. Thus, the necessity for corroboration arises not from any inherent weakness of a dying declaration as a piece of evidence, as held in some of the reported cases, but from the fact that the Court, in a given case, has come to the conclusion that that particular dying declaration was not free from the infirmities, referred to above or from such other infirmities as may be disclosed in evidence in that case."

63. The above observations made by the Apex Court were duly endorsed in **Harbans Singh v. State of Punjab6** (Constitution Bench) and **Tapinder Singh v. State of Punjab**7.

64. In **Laxman v. State of Mahrashtra (2002) 6 SCC 710** (Constitution Bench), the Apex Court observed as under: (SCC p.713-14, para 3)

"3. The juristic theory regarding acceptability of a dying declaration is that such declaration is made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the man is induced by the most powerful consideration to speak only the truth. Notwithstanding the same, great caution must be exercised in considering the weight to be given to this species of evidence on account of the existence of many circumstances which may affect their truth. The situation in which a man is on the deathbed is so solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason the requirements of oath and cross-examination are dispensed with. Since the accused has no power of cross-examination, the courts insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The court, however, has always to be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. The court also must further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. Normally, therefore, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eyewitnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral or in writing and any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a Magistrate or a doctor, or a police officer. When it is recorded, no oath is necessary nor is the presence of a Magistrate absolutely necessary, although to assure authenticity

it is usual to call a Magistrate, if available for recording the statement of a man about to die. There is no requirement of law that a dying declaration must necessarily be made to a Magistrate and when such statement is recorded by a Magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the Magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise."
(Emphasis Add)

65. In **Paniben v. State of Gujarat, (1992) 2 SCC 474**, the Apex Court observed as under: (SCC p. 480-81, para 18)

"18. Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross-examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the Court also insists that the dying declaration should be of such a nature as to inspire full confidence of the Court in its correctness. The Court has to be on guard that the statement of the deceased was not as a result of either tutoring, prompting or a product of imagination. The Court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailants. Once the Court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence. This Court has laid down in several judgments the principles governing dying declaration, which could be summed up as under:

(i) There is neither rule of law nor of prudence that the dying declaration cannot be acted upon without corroboration. [Munnu Raja v. State of M.P. (1976) 3 SCC 104]

(ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. (State of M. P v. Ram Sagar Yadav, (1985) 1 SCC 552: AIR 1985 SC 416, Ramawati Devi v. State of Bihar, (1983) 1 SCC 211: AIR 1983 SC 164)

(iii) This Court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had opportunity to observe and identify the assailants and was in a fit state to make the declaration. (K. Ramchandra Reddy v. Public Prosecutor, (1976) 3 SCC 618: AIR 1976 SC 1994)

(iv) Where dying declaration is suspicious it should not be acted upon without corroborative evidence. [Rasheed Beg v. State of Madhya Pradesh (1974) 4 SCC 264]

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. (Kake Singh v. State

of M. P., 1981 Supp SCC 25: AIR 1982 SC 1021)

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. [Ram Manorath v. State of U. P. (1981) 2 SCC 654]

(vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected. (State of Maharashtra v. Krishnamurthi Laxmipati Naidu, 1980 Supp SCC 455: AIR 1981 SC 617)

(viii) Equally, merely because it is a brief statement, it is not be discarded. On the contrary, the shortness of the statement itself guarantees truth. (Surajdeo Oza v. State of Bihar, 1980 Supp SCC 769 : AIR 1979 SC 1505)

(ix) Normally the court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eye-witness has said that the deceased was in a fit and conscious state to make this dying declaration, the medical opinion cannot prevail. (Nanahau Ram v. State of M.P., 1988 Supp SCC 152: AIR 1988 SC 912)

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. (State of U. P. v. Madan Mohan, (1989) 3 SCC 390: AIR 1989 SC 1519)

66. It has been emphasised in various judgments by the Apex Court that Section 32(1) of the Evidence Act attaches special sanctity to a dying declaration and unless such dying declaration can be shown to be unreliable, it will not affect its admissibility. It was further held that although a dying declaration has to be closely scrutinised, once the court comes to the conclusion that it is true, no question of corroboration arises. (Vide: **Khushal Rao v. State of Bombay8, Harbans Singh v. State of Punjab9, Gopal Singh v. State of M.P.10, Ram Bihari Yadav v. State of Bihar11, Ramilaben Hasmukhbhai Khristi v. State of Gujarat12, Bhajju v. State of M.P.13 and Suresh Chandra Jana v. State of W.B.14).**

67. There is not even a rule of prudence which has hardened into a rule of law that a dying declaration cannot be acted upon unless it is corroborated. The Primary effort of the court has to be to find out whether the dying declaration is true. If it is, no question of corroboration arises. It is only if the circumstances surrounding the dying declaration are not clear or convincing that the court may, for its assurance, look the corroboration to the dying declaration. (Vide: **State of U.P. v. Ram Sagar Yadav**15)

The above settled legal position was followed in **Madan @ Madhu Patekar v. State of Mahrashtra**16.

68. A mechanical approach in relying upon a dying declaration just because it is there is extremely dangerous. The court has to examine a dying declaration scrupulously with a microscopic eye to find out whether the dying declaration is voluntary, truthful, made in a conscious state of mind and without being influenced by the relatives present or by the investigating agency who may be interested in the success of investigation or which may be negligent while recording the dying declaration. (Vide: **Puran Chand v. State of Haryana**17). The intrinsic worth and reliability of a dying declaration can generally be judged from its tenor and contents themselves. (Vide: **State of Rajasthan v. Ganwara**18)

69. Law relating to appreciation of evidence in the form of more than one dying declaration is well settled. If there is more than one dying declaration, then the court also has to scrutinise all the dying declarations to find out if each one of these passes the test of being trustworthy. The Court must further find out whether the different dying declarations are consistent with each other in material particulars before accepting and relying upon the same. (Vide: **Kundula Bala Subrahmanyam v State of A.P**.19) If some inconsistencies are noticed between one dying declaration and the other, the court has to examine the nature of the inconsistencies, namely, whether they are material or not. While scrutinising the court has to examine the same in the light of the various surrounding facts and circumstances. (Vide: **Amol Singh v. State of M.P**.20)

70. A bare perusal of the provisions of Section 161, 162 (2) of Cr.PC read with Section 32 of the Evidence Act would reveal that a statement of a person recorded under Section 161 Cr.PC would be treated as a dying declaration after his death and had evidentiary value. (Vide: **Mukeshbhai Gopalbhai Barot v. State of Gujarat**21). A similar view has been expressed by the Apex Court in **Sri Bhagwan v. State of U.P**.22 and further observed that it is quite clear that such statement would be relevant even if the person who made statement was or was not at the time when he made it was under the expectation of death but has cautioned as to the extreme care and caution to be taken while relying upon such evidence recorded as a dying declaration. The above view has been followed by the Apex Court in **Pradeep Bisnoi v. State of Orissa**23.

71. The law does not provide that a dying declaration should be made in any prescribed manner or in the form of questions and answers. The dying declaration need not be in the form of questions and answers. (Vide: **Ram Bihari Yadav v. State of Bihar and Others**24) Merely because a dying declaration was not in question-answer form, the sanctity attached to a dying declaration as it comes from the mouth of a dying person cannot be brushed aside and its reliability cannot be doubted. (Vide: **Prem Kumar Gulati v. State of Haryana**25) Where the Executive Magistrate before recording the dying declaration had obtained the certificate of the doctor that the deceased was in a fit mental state to make the statement, the doctor again testified before the Court that she was fully conscious and was in a position to give her statement, the dying declaration recorded by the Executive Magistrate was not rejected merely because it was not recorded in questions and answers form. (Vide: **Satish Chandra v. State of M.P**26.) Merely because the parents and other relatives of the deceased were present in the Hospital, when the statement of the deceased was recorded it cannot be said that the said statement was a tutored one. It is quite natural that when such an incident happens, the parents and other relatives try to reach the hospital immediately. Merely because they were in the hospital, the same is no ground to disbelieve the dying declaration, recorded by the Magistrate, who examined as PW-16." (Vide: **Satpal v. State of Haryana**27)

72. It is a settled principle of law that the prosecution has to prove its case beyond any reasonable doubt while the defence has to prove its case on the touchstone of preponderance and

probabilities. (Vide: **Shudhakar v. State of M.P.** 28)

73. Having noticed the above settled position of law, now we shall deal with the contention made on behalf of the appellants that the dying declaration is the result of tutoring, prompting, or imagination and the deceased had no opportunity to observe and identity and was not in a fit state of mind to make the dying declaration.

74. It is an undisputed fact that the dying declaration was recorded by PW-7 Gur Saran Lal within 12 hours of the incident after taking the certificate of the doctor (E.M.O.). The doctor certified that the declarant was in a fit state of mind and at that time, PW-7 Gur Saran Lal, Executive Magistrate/Naib Tehsildar, the doctor, and the declarant were present there. After recording the dying declaration, the doctor recertified that the declarant was in a fit mental condition during and after the statement.

75. Upon close scrutiny of the entire prosecution ocular evidence, we observed that the appellants did not put any questions or suggestions to the witnesses on the following material facts:

(i) There was a dispute between the deceased and the appellant Jakir Ali, due to Jakir's illicit relations with the appellant Kutti. A Panchayat was held regarding the above dispute.

(ii) Jakir had threatened several times to kill Zahida and she gave information to the police on 7.6.2011 and 14.7.2011 about the danger to her life.

(iii) The incident took place at 1:30 a.m. on the roof of the two-storeyed house of the appellant Jakir Ali, the deceased slept there and her two children were sleeping on an adjacent cot and her 4 children were sleeping in the Sahan (front courtyard) of the house.

(iv) PW-2 Mohd. Salim as neighbour of the deceased had reached on the spot within a minute and rescued her after hearing the cries of the injured. He saw both the appellants Jakir Ali and Kutti running away from the place of the incident.

(v) The deceased told PW-2 Mohd. Salim that Jakir and Kutti tied a rope around her neck, poured kerosene oil on her body, and set her on fire.

(vi) PW-1 Mohd. Umar arrived at the spot after receiving the information from PW-2 Mohd. Salim, within 10 minutes of the incident and he brought the injured to C.H.C. Etwa. The deceased also told PW-1 that Jakir and Kutti tied a rope around her neck, poured kerosene oil on her body, and set her ablaze.

(vii) A ligature mark was found all around the neck size 1 cm x 30 cm injury colour was red and 80% of burn injures were found on the body of the injured at the time of medical examination conducted by PW-4 Dr. V. K. Vaid at 2:00 a.m. on 17.7.2011.

(viii) PW-4 Dr. V. K. Vaid after examination of the injured at 2:00 a.m., informed the police.

(ix) PW-7 Gur Saran Lal recorded the dying declaration on 17.7.2011 in presence of the doctor (E.M.O.) after taking the certificate of the doctor regarding the fit state of mind and condition of the injured. The doctor recertified her sound mental condition during and after the statement.

(x) At the time of recording the dying declaration, PW-7 Gur Saran Lal, the doctor (E.M.O.), and the declarant were present.

76. In the instant case, the dying declaration has been properly proved by PW-7 Gur Saran Lal. It is significant to note that in the course of cross-examination of PW-7 proving the dying declaration, no

questions were put as to the state of health of the deceased, and no suggestion was asked as to whether the deceased was not in a fit state of mind to make any such statement. As per the dying declaration (Ex.Ka.-7) of the deceased, she has given a clear and vivid account of the incident as her husband came at 1:30 a.m. when she was sleeping on the roof of the two-storeyed house, her two children were sleeping on the adjacent cot and four other children slept on the ground floor. Her husband poured kerosene oil over her body and setting her to clothes by lighting a matchstick, after trying to kill her by tying her neck with a rope. Her husband Jakir, and Kutti carried out the incident and both of them are guilty. Upon making her cries, both of them fled away leaving her alone. Her children and other villagers came and saved her.

77. We have noticed, that on the night of the incident, only 7 persons were sleeping in the house. Out of which, the deceased and her two children were sleeping on the roof of the house and four children were sleeping in the Sahan (front courtyard). DW-1 Juber Ali (son of the deceased) corroborated the above fact and stated in his examination-in-chief that he and his sister Rubina slept on the roof with his mother. The eldest sister and the other three sisters were sleeping on the ground floor.

78. PW-2 Mohd. Salim in his cross-examination stated that Jakir used to live with Kutti, in Kutti's house, which is situated about five hundred steps away from Jakir's house in the outskirts of the village. The place of the incident is ten steps away from his house. He would have taken half a minute to reach the spot after hearing the cries. DW-1 Juber Ali stated in his examination-in-chief that his father lived in Bombay. When he came, he lived with his second wife.

79. The appellants have examined the son of the deceased as DW-1 Juber Ali, who slept on the roof at the time of the incident as per the prosecution case. It is a surprising fact that the appellants have examined DW-1 only for proving that the dying declaration is a result of tutoring, but interestingly, he stated that he had gone to the hospital to see his mother after 2 or 3 days after the incident. Admittedly, the dying declaration was recorded on 17.7.2011 i.e. within 12 hours of the incident. The appellants have not claimed that on the night of the incident they were sleeping in the house. They have also not claimed that Zahida has received the injuries in an accident.

80. Interestingly, it has also not been claimed by the appellants that Rehana and Babbu (the son), who were admittedly sleeping on the roof adjacent to the deceased had seen the incident because according to DW-1 Juber Ali (as the only son of the deceased), he after asking his mother went to the toilet located at the ground floor of the house and slept there and the incident took place after half an hour. Inspite of that it was submitted that Rehana and Babbu, who were sleeping adjacent to the deceased on another cot were not questioned by the investigating officer.

81. The doctor (E.M.O.) was present at the time when PW-7 Gur Saran Lal recorded the statement and he also made an endorsement on the dying declaration about the fit mental condition of the injured. PW-7 recorded the dying declaration after satisfying himself that the declarant was in

a fit mental condition. The mere fact that the doctor in whose presence dying declaration had been recorded, was not examined does not affect the evidentiary value to be attached to the dying declaration. Therefore, it cannot be said that Zahida was not in a fit state of mind while making her statement. We have noticed that insistence for certification by the doctor is only a rule of prudence to be applied based on the facts and circumstances of the case. The real test is as to whether the dying declaration is truthful and voluntary.

82. We have noticed above, that at the time of recording the dying declaration, PW-7 Gur Saran Lal, the doctor, and the declarant were present. The appellants did not dispute the fact of tutoring the deceased by PW-1 Mohd. Umar. The suggestion of tutoring to the deceased was asked to PW-1 Mohd. Umar.

83. It is not a case of defence that when she made her statement, she was surrounded by any of her close relatives who could have prompted her to make an incorrect or false statement. There is no material to show that the dying declaration was a result of the product of imagination, tutoring, or prompting. Mere presence of PW-1 Mohd. Umar and his other two sisters in the hospital is no ground to disbelieve the dying declaration because their presence is quite natural after the incident. On the contrary, the same appears to have been made by the deceased voluntarily. In the absence of the same so far as the voluntariness of the statement is concerned, there can be no doubt because the deceased was free from external influences or pressure.

84. Keeping in mind, the settled position of law and surrounding circumstances of the case, we are of the considered view that there is no reason why the dying declaration which is otherwise found to be true, voluntary, and correct should be rejected only because the doctor who was present at the time of recording the dying declaration was not examined by the prosecution to support his certification of fitness of the deceased. It may also be noticed that PW-7 Gur Saran Lal, who recorded the statement could be attributed with any kind of ill-feeling against the appellants. We do not find any material on record on the basis of which the testimony of PW-7 Gur Saran Lal can be disbelieved.

85. After examining the entire surrounding circumstances and with reference to the principles governing the weighing of evidence, we are unhesitatingly of the opinion that at the time of, when PW-7 Gur Saran Lal was recording the dying declaration, the declarant was in a conscious state of mind and she was in a fit mental condition to make her statement. It is not a result of tutoring, prompting, or a product of imagination. The dying declaration (Ex.Ka.-7) was free from tutoring, prompting and imagination. The dying declaration is thus, voluntary and truthful.

86. Now, we shall proceed to examine the argument of the learned counsel for the appellants that there is a discrepancy between the oral statements of the deceased as told to PW-1 Mohd. Umar, PW-2 Mohd. Salim and PW-8 S.I. Satanand Pandey (I.O.) on one hand and dying declaration (Ex.Ka.-7) recorded by PW-7 Guru Saran Lal, on the other hand. The prosecution converted the case of an accidental burn into the case of a homicidal burn.

87. Learned counsel for the appellants vehemently argued that according to the

oral statements of the deceased, the active role attributed to both the appellants but the contrary by the written dying declaration, the active role is assigned only to the appellant no. 1 Jakir Ali. Due to the above inconsistency, it is not safe to act upon the dying declaration (Ex.Ka.-7) without corroboration.

88. We have noticed above that on the night of the incident 7 persons were sleeping in the house. The deceased and her two children were sleeping on the roof of the two-storeyed house, and four other children were sleeping in the Sahan of the house. No other persons were present before the incident in the house. It is not disputed on behalf of the appellants that PW-2 Mohd. Salim saw the appellants running away from the incident immediately after the occurrence. According to the written dying declaration recorded by PW-7, the deceased clearly stated that "I started burning. After making noise, my husband Jakir and Kutti fled away leaving me alone.'

89. It is also not disputed that a ligature mark was found all around the neck size 1 cm x 30 cm injury colour was red in colour and 80% burn injuries were found on the body of the deceased immediately after the incident. However, on behalf of the appellants, it was submitted that the ligature mark had not been found at the time of post-mortem.

90. In this regard, it would be useful to extract a passage from Modi's Medical Jurisprudence and Toxicology (24th Edn. at page 446, 451, and 455):

*"**Ligature Mark**: ligature mark depends on the nature and position of the ligature used. The mark varies according to the nature of the material used as a ligature and period of suspension of the body after death. If the ligature is soft, and the body be cut down from the ligature immediately after death, there may be no mark. Again, the intervention of a thick and long beard or clothes on the neck may lead to the formation of a slight mark."*

at page 451,

"If the windpipe is compressed so suddenly as to occlude the passage of air altogether, the individual is rendered powerless to call for assistance, becomes insensible, and may die instantly."

at page 455,

It must be borne in mind that strangulation may be committed without any noise or disturbance; even if other persons are in close vicinity, they may not be aware of the act. This may happen in garrotting, where a victim is suddenly overpowered from behind, by using a rope, dhoti or the hands."

91. From the extract of Modi's Medical Jurisprudence, it appears that the presence of marks of resistance would depend on a variety of factors, including the method and manner of execution of the act of strangulation by the culprits; and mere want of such marks cannot be decisive of the matter. The learned trial court concluded that after 7 days of the incident this ligature mark can fade. Significantly, the appellants have not asked any question of opinion to PW-4 Dr. V. K. Vaid and PW-6 Dr. R. K. Verma, about the ligature mark found all around the neck of the deceased at 2:00 a.m. on 17.7.2011, and whether it can fade within 7 days.

92. Apart from this, It has been noticed above as per the prosecution case, in the intervening night 16/17.7.2011, only 7 persons were sleeping in the house, the

appellants have not come with the case that they were sleeping or living in the house, soon before the incident. PW-2 Mohd. Salim stated in his cross-examination that Jakir, along with Kutti, lived in Kutti's house, which is situated in the outskirts of the village, about 500 steps from Jakir's house. DW-1 Juber Ali (son of the deceased) also corroborated the above fact and stated in his examination-in-chief that his father got married to a girl, whose house is situated in the same village, and his father used to live with her. His mother and sisters live in the house. There is no evidence on record as to whether Jakir married Kutti and appellant no. 2 Kutti lived in the house of appellant no. 1 Jakir Ali at the time of the incident.

93. As per the prosecution case, first oral dying declaration was made by the deceased to PW-2 Mohd. Salim, to whom the deceased had narrated the incident immediately after the occurrence. PW-1 Mohd. Umar, on the basis of the oral dying declaration of the deceased, lodged the FIR. The third dying declaration was recorded by PW-7 Gur Saran Yadav, Executive Magistrate, and PW-8 S.I. Satanand Pandey has also recorded the statement of the injured on 19.7.2011 under Section 161 Cr. PC. The appellants have neither disputed the oral statements of the deceased nor the dying declaration recorded by PW-7.

94. The Apex court in various judgments laid down the settled position of law that Section 34 IPC embodies the principle of joint liability in doing the criminal act based on a common intention and the totality of circumstances must be taken into consideration in arriving at the conclusion whether the accused had common intention to commit an offence of which they could be convicted. (Vide: **Noor Mohammad Mohd. Yusuf Momin v. State of Maharashtra**29. Criminal act mentioned in Section 34 IPC is the result of the concerted action of more than one person and if the said result was reached in furtherance of common intention, each person is liable for the offence as if he has committed the offence by himself. (Vide: **Balvir Singh v. State of M.P**.30) The totality of the circumstances must be taken into consideration in arriving at a conclusion whether the accused had a common intention to commit an offence for which they can be convicted. The facts and circumstances of cases vary and each case has to be decided keeping in view the facts involved. (Vide: **Maqsoodan v. State of U.P**.31)

95. By taking the advantage of endorsement of medical injuries in the 'Accidental Register' by PW-4, Dr. V. K. Vaid, it was submitted that Zahida received burn injuries in an accident. Due to this reason, the FIR of the case has been lodged after about 15 hours of explained delay. It was feebly contented on behalf of the appellants that the prosecution lodged the FIR after consultation and deliberation. However, the appellants came out with a false case of an accident, which, as such is not supported by any evidence. The evidence speaks contrary to the contention.

96. It is an undisputed fact that the deceased received the injuries (ligature mark on her whole neck and the 80% burn injuries) in the incident. On behalf of the appellants, no question was put to PW-1 Mohd. Umar and PW-2 Mohd. Salim about the incident asking as to how the incident took place, and without disputing the factum of the incident, it was suggested that PW-1 told the doctor about the injuries

received by the deceased in an accident. Nothing has been urged to suggest that the doctor (PW-4) was in any way interested in the outcome of the case. It is rare to find in a criminal case that the description of the incident and injury described in the dying declaration gets full corroboration from the medical evidence contained in the injury report and post-mortem report. But in the instant case, two different types of injuries found by PW-4 Dr. V. K. Vaid speak the complete truth of the incident.

97. Apart from this, the testimony of DW-1 Juber Ali, also indicated the circumstances with regard to the incident. He stated in his examination-in-chief that the night before the incident, after asking his mother, he went to the toilet, which is located on the ground floor and he slept there. After half an hour, he heard cries of his mother "*Bachao Bachao*" and she came down screaming after that person of the vicinity had come.

98. Keeping in mind, the settled position of law and after considering all surrounding circumstances as discussed above, we are of the considered view that the dying declaration made by Zahida to PW-7 is straight-forward, rational, consistent, and coherent. There appears to be a ring of truth in the statement made by Zahida about the involvement of the appellant Kutti. There is no inconsistency between the oral dying declarations and the written dying declaration. It is a case of homicidal death.

99. It was also submitted that during the investigation the mattress and rope have not been recovered. As we have held that the dying declaration of the deceased is voluntary and truthful, therefore, defect in the investigation has no consequences since it is well settled that if the police records become suspect and investigation perfunctory, it becomes the duty of the Court to see if the evidence given in Court should be relied upon and such lapses ignored. (Vide: **Sathi Prasad v. The State of U.P.**32). If primacy is given to such designed or negligent investigation, to the omission or lapses by perfunctory investigation or omissions, the faith and confidence of the people would be shaken not only in the law enforcement agency but also in the administration of justice. (Vide: **Ram Bihari Yadav and Ors. v. State of Bihar and Ors.**33)

SUMMARY OF OUR ANALYSIS AND THE CONCLUSIONS DERIVED THEREFROM

100. After evaluating the evidence, circumstances analysed above and keeping in mind the settled position of law, we are unhesitatingly of the opinion that the statement of the deceased (Ex.Ka.-7) is truthful and voluntary and the deceased had the opportunity to observe and identify. We have arrived at this conclusion on the basis of the following circumstances:

(a) The appellants without disputing the fact that PW-1 Mohd. Umar and his two other sisters tutored the injured, it is suggested that PW-1 and his two other sisters who were present in the hospital, tutored the injured.

(b) On behalf of the appellants, it is not disputed that the injured was not in a fit state of mind at the time of recording the dying declaration but claimed that the prosecution has failed to prove the above fact because the doctor is not examined.

(c) The appellants asked the suggestion to PW-2 Mohd. Salim that he has given false evidence due to the enmity

of village election without disputing the facts of the incident as told by the deceased to PW-2 for the first time and PW-2 had seen the appellants running away from the place of the incident.

(d) The appellants asked a suggestion to PW-1 Mohd. Umar that he had told the doctor (PW-4 Dr. V. K. Vaid) that his sister was accidentally burnt without disputing the facts of the incident as told by the deceased to PW-1.

(e) PW-4 stated in his cross-examination that Mohd. Umar told him that she was burnt. Apart from this, on behalf of the appellants, it is not disputed and suggested to PW-4 Dr. V.K. Vaid that the medical report (Ex.Ka.-4) was registered in the 'Accidental Register' because PW-1 Mohd. Umar told him about the accidental injuries of Zahida.

(f) The appellants did not ask any question to PW-4 Dr. V. K. Vaid regarding the injuries sustained by the injured they even did not ask the same as a question of opinion that if a ligature mark on the whole neck and 80% burn injuries could occur in the same incident. It is also not disputed that PW-4 informed the police after conducting the medical examination.

(g) The deceased having 6 children (5 daughters and one son), DW-1 Juber Ali, also known as Babbu, did not say anything about the injuries sustained by the deceased; the tutoring and prompting by the near relatives of the deceased, and he also did not say about sleeping or living of the appellants in the house soon before the occurrence.

101. Following aspects emerge from the discussion of the prosecution evidence:

(a) The appellant Jakir wanted to keep the appellant Kutti as his wife in his house, but the deceased was an obstacle in his way. There was a dispute between the deceased and Jakir regarding the above illicit relationship.

(b) The husband of the deceased, Jakir, and the appellant Kutti together reached the spot i.e. on the roof of the two-storeyed house, with a common intention under a preconcert plan to commit the murder of Zahida. The appellants had deliberately chosen after midnight for committing the murder when the deceased and her children were sleeping.

(c) The appellants stealthily entered the premises in question and reached the roof of the house by taking the open staircase.

(d) Ligature mark on the whole neck and burn injuries which were found on the whole of the back, both thighs and arms of the deceased in the medical report clearly show that the appellants firstly tied her neck for restraining her from making a noise, then poured kerosene oil on her body and set her ablaze. The above two acts, tying her whole neck and setting her on fire after pouring kerosene oil on her body cannot be executed by one accused appellant at a time.

102. In view of the foregoing analysis and conclusions, we are of the considered view that the trial court rightly found the dying declaration (Ex.Ka.-7), truthful and trustworthy and the circumstances surrounding the dying declaration are clear and convincing, it can be acted upon without corroboration to hold the prosecution successfully proved the charge under Section 302 read with Section 34 I.P.C. against the appellants Jakir Ali and Kutti @ Alimunnisha. The findings of the trial court are based on proper appreciation of the evidence. The injuries on the body of the deceased fully support the prosecution case. The statement made by the deceased

on 17.7.2011, thus, finds corroboration from the injuries on the body of the deceased and the sequences of the events and manner of incidents as claimed by the prosecution. PW-1, the informant and PW-2 neighbour of the deceased have fully supported the prosecution case. We are fully satisfied that the trial court did not commit any error in convicting the appellants. Therefore, we affirm the conviction and sentence awarded to the appellants and hold them guilty for offence punishable under Section 302 read with Section 34 I.P.C. We, thus, do not find any merit in this appeal. The criminal appeal is **dismissed** accordingly. The appellants are in jail.

Let a certified copy of this judgment with record be sent to the trial court for information forthwith. The office is directed to provide the certified copy of the judgment separately to the appellants promptly.

(2021)06ILR A60
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 02.06.2021

BEFORE

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

Criminal Appeal No. 1202 of 2014
and
Capital Sentence No. 6 of 2014

Ubhan Yadav @ Abhai Kumar Yadav ...Appellant

Versus

State of U.P. ...Respondent

Counsel for the Appellant:
Anand Dubey, Arvind Kumar, Piyush Kumar Singh, Santosh Kumar Kanaujia

Counsel for the Respondent:
Govt. Advocate

(A) Criminal Law - Code of Criminal Procedure, 1973 - Section 374 - Section 366 - Death Reference - Indian Penal Code, 1860 - Sections 302 376 & 201 I.P.C. - Indian Evidence Act, 1872 - Section 25,26,27 - Section 27 only becomes applicable when the confession St. ment leads to the discovery of a new fact -Appeals from conviction , circumstantial evidence - All links in the chain of circumstances must be prove beyond reasonable doubt - proved circumstances must be consistent only with the hypothesis of guilt of the accused alone and none else, as also inconsistent with his innocence.(Para - 42,51)

(B) Constitution of India - Article 20(3) - no accused of an offence shall be compelled into being a witness against himself - confession made by any person to a police officer is inadmissible as evidence, except for the singular cases where such St. ment results in a consequent discovery of fact. (Para - 46,47)

(C) Practice and Procedure - **presumption of certain facts by the Courts in the absence of direct evidence of an offence has been an accepted practice - presumption must be an inference of fact drawn from another proved fact that is likely to flow as a common course of natural events, human conduct and public/private business vis-avis the facts - Courts in drawing such presumption must look at the facts from an angle of common sense and common experience of man.** (Para - 54)

In the present case, 12 years' old girl has been sexually assaulted and done to death by throttling - fact remains -whether it was the accused-appellant who has committed the alleged crime appears to be doubtful .

HELD:- The prosecution failed to prove its case beyond reasonable doubt. The incident does not appear to have happened in the manner in which the prosecution want the Court to believe it had happened. Therefore, the accused-appellant becomes entitle for the benefit of doubt and the appeal deserves to be allowed. (Para -71)

Criminal Appeal allowed. (E-6)

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1. Anokhilal Vs St.of M.P. , 2019 SCC OnLine SC 1637

2. Shadaan Ansari Vs St.of U.P. & ors. , 2020 SCC OnLine All 19

3. Gargi Vs St. of Har. ,(2019) 9 SCC 738

4. Chandmal Vs St. of Raj., (1976) 1 SCC 621

5. St. of U.P. Vs Hari Mohan, (2000) 18 SCC 598

6. Raj Kumar Singh Vs St. of Raj., (2013) 5 SCC 722

7. Ganpat Singh Vs St. of M.P. ,(2017) 16 SCC 353

8. Baiju Kumar Soni Vs St. of Jharkh.,(2019) 7 SCC 773

9. Rajendra Vs St. (NCT of Delhi), (2019) 10 SCC 623

10. Hanumant Govind Nargundkar Vs St. of M.P. ,AIR 1952 SC 343

11. Shivaji Shahabrao Bobade Vs St. of Mah. ,(1973) 2 SCC 793

12. CBI Vs Mahender Singh Dahiya ,(2011) 3 SCC 109

13. Ramesh Harijan Vs St. of U.P. ,(2012) 5 SCC 777

14. Sujit Biswas Vs St. of Assam ,(2013) 12 SCC 406

15. Anjan Kumar Sarma Vs St. of Assam ,(2017) 14 SCC 359

16. Kali Ram Vs St. of H.P. ,(1973) 2 SCC 808

17. Hanumant Govid Nargundkar Vs St. of M.P. ,AIR 1952 SC 343

18. Gurpreet Singh Vs St. of Har. ,(2002) 8 SCC 18

19. Ram Singh Vs Sonia ,(2007) 3 SCC 1

20. Musheer Khan Vs St. of M.P. ,(2010) 2 SCC 748

21. Shivaji Sahabrao Bobade Vs St. of Mah. ,(1973) 2 SCC 793

22. St. of Karn. Vs J. Jayalalitha ,(2017) 6 SCC 263

23. Ashok Debbarma Ram Vs St. of Tripura ,(2014) 4 SCC 747

24. St. of U.P. Vs Deoman Upadhyay ,AIR 1960 11 SCC 1125

25. Bodhraj @ Bodha Vs St. of J&K, (2002) 8 SCC 45

26. Aghnoo Nagesia Vs St. of Bihar, AIR 1966 SC 119

27. Vasanta Sampat Dupare Vs St. of Mah., (2015) 1 SCC 253

28. Ishwari Lal Yadav Vs St. of Chattisgarh ,(2019) 10 SCC 437

29. Limbaji Vs St. of Mah., (2001) 10 SCC 340

30. St. of A.P. Vs Vasudeva Rao ,(2004) 9 SCC 319

31. Ram Chander Vs St. f Har., (1981) 3 SCC 191

32. Laxman Naik Vs St.of Orissa , (1994) 3 SCC 381

33. Dhananjoy Chatterjee @ Dhana Vs St.of W.B. , (1994) 2 SCC 220

34. Shivaji @ Dadya Shankar Alhat Vs St.of Mah. , (2008) 15 SCC 269

35. Krishan Kumar Malik Vs St. f Har., (2011) 7 SCC 130

36. Aghnoo Nagesia Vs St. of Bihar, AIR 1966 SC 119

37. Vsanta Sampat Dupare Vs St. of Mah., (2015) 1 SCC 253

38. Ishwari Lal Yadav Vs St. of Chhatt., (2019) 10 SCC 437

39. St. of UP Vs Deoman Upadhyay, AIR 1960 SC 1125

40. Limbaji Vs St. of Mah., (2001) 10 SCC 340

41. St. of A.P. Vs Vasudeva Rao, (2004) 9 SCC 319

42. Ram Chander Vs St. of Har., (1981) 3 SCC 191

43. St .of Raj. Vs NI, (1997) 6 SCC 162

44. Sunil Kundu & anr. Vs St. of Jharkhand , 2013 (4) SCC 422

45. Mahesh Tigga Vs St. of Jhar. ,(2020) 10 SCC 108

46. Satbir Singh & Vs anr. St. of Har., Criminal Appeal No.1735-1736 of 2010

47. Reena Hazarika Vs St. of Assam, (2019) 13 SCC 289

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

(1) The criminal appeal filed by the accused-appellant namely Ubhan Yadav @ Abhai Kumar Yadav under Section 374 (2) Cr.P.C. and the Death Reference under Section 366 Cr.P.C., are decided by way of common judgment.

(2) Heard Shri Santosh Kumar Kanaujiya and Shri Arvind Kumar Verma, learned counsels for the accused-appellant (Ubhan Yadav @ Abhai Kumar Yadav) as well as Shri Vimal Kumar Srivastava, learned Government Advocate assisted by Shri Chandra Shekhar Pandey, learned counsel for the State and perused the lower court record.

(3) As in the case in hand, the accused-appellant namely Ubhan Yadav @ Abhay Kumar Yadav was tried by the trial court and convicted under Sections 302 376 & 201 I.P.C. whereby he was sentenced to be hanged, by the neck, till death for offence under Section 302 I.P.C., sentenced for life imprisonment and with a fine of Rs.6,000/- for the offence under Section 376(2)(F), in case of non payment of fine, additional one year of Simple Imprisonment, and sentenced for five years of Rigorous Imprisonment with a fine of Rs.4,000/- for the offence under Section 201 I.P.C., in case of non payment of fine, additional four months of S.I.

(4) After convicting the accused-appellant for sentence of death, reference was made by the trial court, which was registered as Capital Sentence No.06 of 2014, and the same is lying before us for confirmation of such sentence and death. The accused-appellant has challenged the judgment and order dated 29.08.2014 passed by Shri Satya Prakash Naik, Additional Sessions Judge, Court No.1, Barabanki in S.T. No.266 of 2013 arising out of Case Crime No.101 of 2013, under Sections 302, 201 & 376 I.P.C., P.S. Dewa, District Barabanki, in Criminal Appeal No.1202 of 2014 (Ubhan Yadav @ Abhay Kumar Yadav Vs. State of U.P.).

(5) As per the prosecution case, on 30.03.2013 at 21:10 hours, Prem Nath Singh came to the Police Station Dewa, District Barabanki along with Tung Nath Singh S/o Late Raj Bahadur Singh, Bal Govind Yadav & Bechu Singh, and given a written complaint with the allegation that his younger daughter, aged about 12 years, went out from her home on 30.03.2013 at 02:00 p.m. but she did not come back, then due to worry the family members started searching her in the neighbour houses, but no one has responded, thereafter, the family

members and other villagers also started searching her in the adjoining forest & field situated in the north side of the village, then her body was found under black berry *(Jamun)* tree of the grove of Pratap Singh and some visible signs of injury was found on the neck on the body and some nail scratches were also seen on her hand, her pair of leggings was not found on her body and it seems that with intention to outrage her modesty, she was killed.

(6) On the basis of aforesaid complaint of Prem Nath Singh (informant), F.I.R. as Case Crime No.101 of 2013, under Sections 302 I.P.C., P.S. Dewa, District Barabanki was lodged on 30.03.2013 at 21:10 hours in which the time of incident is shown as 14:00 hours (02:00 p.m.) dated 30.03.2013. Chick F.I.R. was prepared and the incident was also entered into General Diary as G.D. No.41 at 21:10 hours for registering the F.I.R. The S.H.O. concerned along with his team reached on the spot and started the inquest of body of the deceased on 30.03.2013 at 22:15 hours and concluded the same at 23:55 hours in the light of seven Petromax and head light of one tractor, and the body was sent for postmortem along with requisite papers. The postmortem of the body of deceased was conducted on 31.03.2013 at 02:00 p.m., in which seven ante-mortem injuries were found on the body of the deceased, and the cause of death opined by the team of doctors is Asphyxia, as a result of ante-mortem throttling.

(7) The Investigating Officer prepared Parcha No.1 on 30.03.2013 by copying the Chick F.I.R. in the Case Diary and recorded the statement of Head Constable Ramraj (Chick F.I.R. writer), and also mentioned that the inquest of the body of the deceased was conducted in the proper light of seven petromax and head light of one tractor, as the place of incident was protected, therefore, the proceeding was deferred for next date. On 31.03.2013, Parcha No.2 of Case Diary was prepared by the Investigating Oficer by copying the contents of the inquest and also recorded the statement of the witnesses of the inquest, inspected the place of incident and prepared the site plan on the pointing out of the informant as well as witnesses of the inquest, and also prepared a recovery memo of the sleepers, under garments and leggings of the deceased; he also recorded the statement of witnesses of recovery memo and the statements under Section 161 Cr.P.C. of Smt. Siyavati (mother of the deceased), Uday Pratap Singh (brother of the deceased) and Kumari Anjali Singh (sister of the deceased), and the statement of witnesses of last seen namely Mohd. Khaleel, Shri Pawan Kumar Singh and Shri Vinay Prakash Singh were also recorded. In the statements of Mohd. Khaleel, Pawan Kumar Singh and Vinay Prakash Singh, the evidence of last seen of accused, near the place of incident, was found. On 01.04.2013, Parcha No.3 was prepared by the Investigating Officer, in which the arrest of accused-appellant is shown and his confessional statement under Section 161 Cr.P.C. was also recorded by the Investigating Officer; on pointing out of the accused, one notebook was recovered from the place of the incident and the recovery memo of the notebook was prepared, and the Investigating Officer also prepared the site plan in relation to the recovery of the notebook. On 02.04.2013, accused-appellant was medically examined and his pubic hair, nails and Penile Wash were taken into possession, and this fact was mentioned in the Parcha No.4 of the Case Diary dated 02.04.2013. Parcha No.5 was

prepared by the Investigating Officer on 03.04.2013. On 04.04.2013, Parcha No.6 was prepared by the Investigating Officer and he recorded the statement of Shiv Bahal Yadav, Shri Balram Singh and Shri Guddu under Section 161 Cr.P.C. On 07.04.2013, Parcha No.8 was prepared by the Investigating Officer, by which the charge sheet was prepared and forwarded to the court concerned.

(8) Learned Chief Judicial Magistrate, Barabanki committed the case, vide order dated 17.05.2013, to the court of session. Thereafter, the case was registered as S.T. No.266 of 2013 (State vs. Ubhan Yadav @ Abhay Kumar Yadav) arising out of Case Crime No.101 of 2013, under Sections 302, 201, 376A I.P.C., P.S. Dewa Kotwali, District Barabanki.

(9) As it is evident from the order sheet that during the course of trial, the accused-appellant was not in a position to engage the counsel to defend him, then the order was passed on 16.07.2013, by the trial court, for appointing the Amicus Curiae/counsel for the accused-appellant and the order sheet reveals that on 30.07.2013, Mr. Yugal Kishore Srivastava, Advocate was informed that he has been appointed as Amicus Curiae to pursue the case of accused-appellant. On the same day, charges were framed by the court below.

(10) The prosecution relied on the oral testimony of PW-1 Prem Nath Singh (informant), PW-2 Vinay Prakash (witness of last seen), PW-3 Mohd. Khaleel (witness of last seen), PW-4 Dr. Brijesh Kumar Srivastava (conducted medical of the accused-appellant and postmortem of the body of the deceased), PW-5 Dr. Shipra Singh (member of the postmortem team), PW-6 Constable Ramraj, PW-7 Smt. Siyawati (mother of the deceased) and PW-8 M.S. Khan (Investigating Officer).

It is also evident from the record that the pubic hair, nails and Penile Wash (fluid spilled by washing the genital part) of the accused-appellant and pubic hair, nails & under garments of the deceased were sent to Forensic Science Laboratory U.P., Mahanagar, Lucknow for chemical examination and report of the aforesaid articles. After examination, report was submitted by Deputy Director FSL, Lucknow on 03.02.2014, which is available on record, but the same was not proved by the prosecution.

(11) The prosecution also relied on sixteen documentary evidences i.e. written complaint of the informant (Ext. Ka-1), inquest of the body of the deceased (Ext. Ka-2), postmortem of the body of the deceased (Ext. Ka-3), medico-legal report of the accused-appellant (Ext. Ka-4), F.I.R. of the incident (Ext. Ka-5), General Diary in relation to the registration of F.I.R. of the incident (Ext. Ka-6), Report of Chief Medical Superintendent, District Hospital Barabanki for postmortem of the body of the deceased and for providing the postmortem report of the deceased, her clothes etc. (Ext. Ka-7), police form No.13 (Ext. Ka-8), challan last photo (Ext. Ka-9), sample seal (Ext. Ka-10), letter to Reserve Inspector of Police Line Barabanki (Ext. Ka-11), Site plan prepared on 31.03.2013 (Ext. Ka-12), recovery memo in relation to under garments, leggings and sleepers of the deceased dated 31.03.2013 (Ext. Ka-13), recovery memo in relation to the notebook of the accused-appellant dated 01.04.2013 (Ext. Ka-14), site plan related to recovery of notebook of the accused-appellant (Ext. Ka-15) and charge sheet dated 07.04.2013 (Ext. Ka-16).

(12) The statement of accused under Section 313 Cr.P.C. was recorded by the trial court and after hearing the arguments of the parties, the judgment and order dated 29.08.2014, which is under challenge, was passed by the trial court.

(13) Learned counsel for the accused-appellant has submitted that he has been falsely implicated in the present case. He further submitted that learned trial court failed to appreciate the evidence in correct perspective. He further submitted that as per the prosecution case, the deceased went out from her home on 30.03.2013 at 02:00 p.m., which was categorically stated by PW-7 Smt. Siyavati (mother of the deceased) and she also stated that when the deceased did not come back till 04:00 - 05:00 p.m., then they started searching for her and she also informed to her husband who was working in the spinning mill and came to home within half an hour and thereafter, he along with others also started searching, then the body of deceased was found in the grove of Pratap Singh under the black berry tree.

(14) Learned counsel for the accused-appellant has further submitted that Vinay Prakash (PW-2) was produced before the trial court, who categorically stated before the court below that the incident was of 30.03.2013 and on the said date when he was coming back after watching his agricultural field in between 02:00 - 02:30 p.m., he saw that co-villager Ubhan Yadav @ Abhay Kumar Yadav (accused-appellant) was coming out from the grove of Pratap Singh and going towards the village from the west side of *Khaliyan*, and when the accused saw the witness (Vinay Prakash), he moved fast but the witness did not notice his activity and went to his home; and when on the same day at 08:00 p.m., body of the deceased was found in the grove of Pratap Singh, then he believed that the incident was caused by the accused-appellant; he also stated in examination-in-chief that the aforesaid fact was brought into the notice of family members of the deceased as well as Investigating Officer and also stated that the accused-appellant does not have good character. He further submitted that the witness Vinay Prakash (PW-2) was also cross-examined in which he stated that he was also searching for the girl (deceased) and he also met with the informant where the dead body of the deceased was found, but he did not speak to him about the activities of accused-appellant. He further deposed that no any article was found near the body of the deceased, and the prosecution case is improbable on the ground that when the deceased girl left her house at 02:00 p.m. and the accused appellant was leaving the grove in between 02:00 - 02:30 p.m., then when and how the said incident was taken place.

(15) Learned counsel for the accused-appellant has further submitted that Mohd. Khaleel (PW-3) was also examined before the trial court and in his examination-in-chief he stated that on the date of incident in between 01:30 - 02:00 p.m., the accused-appellant passed nearby the agricultural field in which he was working and went to the grove of Pratap Singh; and he also deposed that the distance of the grove is 150 mt. from his field in which he had worked since 09:00 a.m. to 05:30 p.m. and when the body of the girl was found then he also went to the place of incident, but he did not speak to her family members, and on the next date, he told to the concerned Sub Inspector.

(16) Learned counsel for the accused-appellant has further submitted that the statements of Smt. Siyavati (PW-7), Vinay Prakash (PW-2) and Mohd. Khaleel (PW-

3) are contradictory as PW-7 Smt. Siyavati (mother of the deceased) has categorically stated that girl went out at 02:00 p.m. from her home, but Vinay Prakash (PW-2) stated that on the date of incident, accused-appellant was going towards village in between 02:00-02:30 p.m. from grove of Pratap Singh and Mohd. Khaleel (PW-3) stated that on the date of incident, he saw the accused-appellant passing nearby the agricultural filed at about 01:30 - 02:00 p.m., in which he was working since 09:00 a.m. to 05:30 p.m., and when the body of the girl was found, then he also went there, but he did not speak to the family members of the deceased, and on the next date he told the same to the Sub Inspector. In such circumstances, the prosecution story is highly doubtful.

(17) Learned counsel for the accused-appellant has further submitted that Dr. Brijesh Kumar Srivastava (PW-4) was examined before the trial court, who conducted the postmortem of the body of the deceased along with the Dr. Shipra Singh (PW-5). He further submitted that in the postmortem report, seven ante-mortem injuries were found on the body of the deceased and doctor has opined that the cause of death is Asphyxia due to ante-mortem throttling. He further submitted that the prosecution failed to send the finger print to FSL for examination and in the postmortem report, PW-5 Dr. Shipra Singh has opined that rape was committed with the deceased, her hymen is torned and admits two finger.

The ante-mortem injuries of the deceased are as under:-

1. Contusion over inner surface of upper and lower lip in an area of 2.5 cm x 1.0 cm.

2. Multiple abrasion 0.5 cm x 0.3 cm (18-12 in no.) present over out aspect of Neck in an area of 10 cm x 7 cm.

3. Abrasion over left forearm, outer aspect, 3 cm x 0.2 cm, just below to left elbow.

4. Abrasion 4 cm x 0.2 cm over outer aspect of left forearm, 3 cm below to injury No. 3.

5. Multiple abrasion (5-6 in no.) ranging from 2 cm x 0.2 cm to 5 cm x 0.2 cm, in area of 7 cm x 7 cm present over antero lateral aspect of left forearm, 3 cm above to left wrist.

6. Multiple abrasion (4-5 in no.) on posterior aspect of left hand ranging from 3 cm x 0.2 cm to 6 cm x 0.2 cm, in area of 6 cm x 6 cm.

7. Multiple abrasions on postero lateral on (Rt.) arm (18 to 20 in no.) present in area of 20 cm x 7 cm ranging from 2 cm x 0.2 cm to 5 cm x 0.5 cm.

(18) Learned counsel for the accused-appellant has further submitted that the accused was medically examined after his arrest and his genital part was also examined. He further submitted that in general examination of accused, no any obvious swelling or mark of external injury was found and in the examination of genital i.e. a) Prepuse (on retracton): smegma present with abrasion 1 cm x 0.5 cm on inner aspect of prepuce on ventral surface, just below the corona of Glans, color of abrasion is bluish black; b) Frenulum: torn, fibrosed; c) Glans: Abraded contusion involving whole periphery of glans i.e. just - anterior to corona, bluish black in colour; and Pubic hair as well as nail of all fingers and Penile Wash of accused-appellant were also taken into custody and sent to FSL for examination along with the pubic hair and other articles of the deceased.

The medico-legal examination of the accused-appellant is as under:-

A. General Exam :-

a. Average built body.

b. Height 145 cm

c. Weight 50 kg

d. No any obivious swelling or mark of external injury visible.

B. Local Exam of Genitalia:

a. Pepuce (on retraction) - Smegma present with abrasion 1 cm x 0.5 cm on inner aspect of prepuce on ventral surface, just below the corona of glans, colour of abrasion is bluish black.

b. Frenulum - Torn, fibrosed.

c. Glans - Abraded contusions involving whole periphery of Glans i.e. just anterior to corona, bluish black in colour.

C. Pubic Hair Shave/Nails cut/wrapped in plain paper and sealed in separate envelops and handed over to CP concerned.

D. Penile wash done with normal saline, sealed in a beaker and handed over to CP concerned for further Forensic/Pathological examn.

Opinion - KUO/caused by friction.

Duration - About 2½-3 days.

One sealed envelop containing Pubic Hair, Sealed envelop contains nails of all fingers, sealed beaker containing penile wash are handed over to CP concerned for further Forensic/Pathological examn, and (3) Sample of the seal handed over to CP concerned.

(19) Learned counsel for the accused-appellant has further submitted that the presence of the smegma reveals that accused appellant has not cleaned his genitals since last 2-3 days. He further submitted that in case, alleged abrasion on the genital of the accused-appellant are due to friction during the course of rape with the deceased having narrow vagina, colour of abrasion was to be red at the glans but in the present case, it is said that abrasion is bluish black in colour and if vagina was narrow then the deceased must have injury on her genital as in the Postmortem Report shows that two fingers admits in vagina. In such circumstances, the story of the prosecution is highly improbable.

(20) Learned counsel for the accused-appellant has further submitted that fibrosed found on frenulum reveals that the accused-appellant has not cleaned his genitals properly since last 2-3 days. Therefore, it was obligatory on the part of the prosecution to get the DNA test to bring out the truth. He further submitted that prior to year 2006, there was no provisions for DNA test, but by way of amendment by Act No.25 of 2005 an explanation clause was added in Section 53 of Cr.P.C., which provides that an examination of the person arrested as is reasonable/necessary in order to ascertain the facts which may support such evidence, examination is defined in the explanation clause includes the examination of blood, blood stain, semen, swab in case of sexual offence, sputum and swab hair samples and finger nails clipping by the use of thorough and scientific techniques including DNA profiling and such others tests which the medical practitioners thinks necessary in a particular case. He further submitted that in the present case, the Articles were sent to FSL and the report was also sent by Deputy Director FSL, Lucknow, vide letter No. 190-BIO-13 dated 03.02.2014 addressed to Chief Judicial Magistrate, Barabanki, in which no semen or sperm was found on the Pubic hair or slide prepared by the doctors.

He further submitted that the aforesaid report was taken on record by the learned trial court on 14.03.2014 but the prosecution, deliberately, has not proved this report because this report denies the prosecution story, but it was the bounden duty of the trial court to look into the same.

(21) Learned counsel for the accused-appellant has further submitted that learned trial court also acted very negligently as the order sheet reveals that on 30.07.2013, Amicus Curiae was informed about his engagement as counsel for the accused and on the same date charges were framed, meaning thereby, no opportunity was given to the Amicus Curiae for accused appellant to prepare for his submissions at the stage of framing of charge. He further submitted that the legal aid provided to the accused-appellant was not competent enough, which is very much evident from the manner in which the cross-examination was conducted by him as well as from his assistance given to the accused-appellant for giving reply regarding his statement under Section 313 Cr.P.C., as Articles 22, 39A of the Constitution of India and Sections 303/304 r/w Rule 37 of General Rules (Criminal), 1977 framed by Allahabad High Court, which provides that the legal aid provided by the Amicus Curiae is not to be an eye wash, but it should be real and effective. He also relied on the decision of ***Hon'ble Supereme Court*** in the case of ***Anokhilal Vs. State of Madhya Pradesh*** reported in ***2019 SCC OnLine SC 1637*** and the case of ***Shadaan Ansari Vs. State of U.P.*** and others reported in ***2020 SCC OnLine All 19.***

(22) Learned counsel for the accused-appellant has further submitted that three tests ought to be satisfied where a decision rests solely on circumstantial evidence - firstly, all circumstances from which inference of guilt is drawn must be cogently and firmly established; secondly, the circumstances must unerringly inclined towards the guilt of the accused; and thirdly, the circumstances taken together must form a chain so complete that it becomes incapable of explanation on any reasonable hypothesis except for the guilt of the accused, and relied on the decision of ***Hon'ble Supreme Court in the cases of Gargi vs. State of Haryana (2019) 9 SCC 738, Chandmal vs. State of Rajasthan (1976) 1 SCC 621, State of U.P. vs. Hari Mohan (2000) 18 SCC 598, Raj Kumar Singh vs. State of Rajasthan (2013) 5 SCC 722, Ganpat Singh Vs. State of M.P. (2017) 16 SCC 353, Baiju Kumar Soni vs. State of Jharkhand (2019) 7 SCC 773 and Rajendra vs. State (NCT of Delhi) (2019) 10 SCC 623.***

(23) Learned counsel for the accused-appellant has further submitted that all circumstances concerned must establish the circumstances of a conclusive nature and tendency and relied on the decision of Hon'ble Supreme Court in the cases of ***Hanumant Govind Nargundkar vs. State of M.P. AIR 1952 SC 343, Shivaji Shahabrao Bobade vs. State of Maharastra (1973) 2 SCC 793, CBI vs. Mahender Singh Dahiya (2011) 3 SCC 109, Ramesh Harijan vs. State of U.P. (2012) 5 SCC 777, Sujit Biswas vs. State of Assam (2013) 12 SCC 406, Anjan Kumar Sarma vs. State of Assam (2017) 14 SCC 359.***

(24) Learned counsel for the accused-appellant has further submitted that in criminal justice system, if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and other to his innocence, the

view which is favourable to the accused should be adopted and relied on the decision of Hon'ble Supreme Court in the case of ***Kali Ram vs. State of Himachal Pradesh (1973) 2 SCC 808.***

(25) Learned counsel for the accused-appellant has further submitted that while appreciating circumstantial evidence, the trial court must adopt a very cautious approach and great caution must be taken to evaluate circumstantial evidence, and he also relied on the decision of Hon'ble Supreme Court in the cases of ***Hanumant Govid Nargundkar vs. State of M.P. AIR 1952 SC 343, Gurpreet Singh vs. State of Haryana (2002) 8 SCC 18, Ram Singh vs. Sonia (2007) 3 SCC 1, Musheer Khan vs. State of M.P. (2010) 2 SCC 748.***

(26) Learned counsel for the accused-appellant has further submitted that it is trite law that in criminal cases, the burden of proof on the prosecution is one of proof beyond reasonable doubt as opposed to a preponderance of possibilities, but in the present case, the prosecution failed to establish its case. As per the prosecution case, the deceased went out from her house at 02:00 p.m., and as per the statement of Vinay Prakash (PW-2) (question No.2 framed under Section 313 Cr.P.C. by the trial court), he has seen that in between 02:00 - 02:30 p.m. accused was coming out from the grove of Pratap Singh and going towards the village and as per the statement of Mohd. Khaleel (PW-3) that he was working in the field since 09:00 a.m. to 05:30 p.m. and the distance of the grove is 150 m from the filed he was working, but he did not notice any incident. In such circumstances, the prosecution story is highly improbable. He also relied on the decisions of ***Hon'ble Supreme Court*** in the case of ***Shivaji Sahabrao Bobade vs. State of Maharastra (1973) 2 SCC 793, State of Karnataka vs. J. Jayalalitha (2017) 6 SCC 263, Ashok Debbarma Ram Vs. State of Tripura (2014) 4 SCC 747.***

(27) Learned counsel for the accused-appellant has further submitted that the prosecution relied on confessional statement of the accused-appellant given to the police and on his pointing out, the notebook was recovered, but the same was not sent for expert opinion in relation to hand writing found in the notebook. He further submitted that the PW-8 M.S. Khan (Investigating Officer) has categorically mentioned in the inquest report and also deposed before the trial court that there was sufficient light of seven petromax and head light of one tractor in which the inquest of the body of the deceased was conducted, but in the inquest report no article is mentioned which was found near to the body of the deceased, and on the next day i.e. 31.03.2013, recovery of under garments, leggings and sleepers of the deceased was done from the same place and the same were taken into custody. On 01.04.2013, on pointing out of the accused-appellant, the notebook was recovered from the place where the leggings and under garments and sleepers of the deceased were recovered

(28) Learned counsel for the accused-appellant has further submitted that if the requirement of Section 27 of Indian Evidence Act are met with i.e. 1) fact is discovered; 2) discovery is in consequence of the confessional statement, then the part of the statement that relates to the fact discovered becomes admissible in the evidence, and the fact discovered envisaged in the section embraces the place from which the object was produced, the knowledge of the accused as to it, but the

information given must relate distinctly to the effect, and he has also relied on the decision of ***Hon'ble Supreme Court in the cases of State of U.P. vs. Deoman Upadhyay AIR 1960 11 SCC 1125 and Bodhraj @ Bodha vs. State of Jammu & Kashmir (2002) 8 SCC 45.***

(29) Learned counsel for the accused-appellant has further submitted that constitutional safeguard provided under Article 20(3) of Constitution of India clearly states that no accused of an offence shall be compelled to be a witness against himself. He further submitted that the provisions of Section 25, 26 & 27 of Indian Evidence Act, 1872 r/w Article 20(3) of Constitution of India make it clear that a confession made by any person to a police officer is inadmissible as an evidence, except for the singular cases where such statement results in a consequent discovery of fact, and also relied on the decision of ***Hon'ble Supreme Court in the cases of Aghnoo Nagesia vs. State of Bihar AIR 1966 SC 119, Vasanta Sampat Dupare vs. State of Maharastra (2015) 1 SCC 253, Ishwari Lal Yadav vs. State of Chattisgarh (2019) 10 SCC 437.***

(30) Learned counsel for the accused-appellant has further submitted that in absence of direct evidence of an offence, presumption must be an inference of the fact drawn from another proved fact that is likely to flow as a common course for natural events, human conduct and public/private business vis-a-vis facts, and also relied on the decision of ***Hon'ble Supreme Court in the cases of Limbaji vs. State of Maharastra (2001) 10 SCC 340 and State of Andhra Pradesh vs. Vasudeva Rao (2004) 9 SCC 319.***

(31) Learned counsel for the accused-appellant has further submitted that decision of trial court suffers from an error in appreciation of principles of evidentiary law, and relied on the decision of ***Ram Chander vs. State of Haryana (1981) 3 SCC 191***.

(32) Learned counsel for the accused-appellant has further submitted that judicial approach must be cautious, circumspect and careful and the court must exercise prudence and each court from the Session court to the Supreme Court must pursue and analyse facts of the case at hand and reach an independent conclusion.

(33) Learned counsel for the accused-appellant has further submitted that learned trial court observed that the accused-appellant was aged about 35 years without any evidence, but the medico legal report reveals that he was aged about 27 years at the time of incident.

(34) Learned Government Advocate has submitted that learned trial court has rightly appreciated the evidence deposed before the trial court. He also submitted that in the present case, modesty of twelve year's old girl was outraged by the appellant and thereafter, she was strangulated to death. He also submitted that involvement of the accused-appellant was found during the course of investigation and he was arrested on 01.04.2013. Thereafter, the accused was medically examined and some injuries were found on his genital parts which was caused due to physical relation with the deceased (minor). He also submitted that on pointing out of the accused, his notebook was recovered from the place of incident which was duly proved by M.S. Khan (PW-8). He also submitted that Vinay Prakash (PW-2) and Mohd. Khaleel (PW-3) deposed before the trial court that they

had seen the accused appellant near the grove of Pratap Singh. He also submitted that Dr. Brijesh Kumar Srivastava (PW-4) and Dr. Shipra Singh (PW-5) deposed before the court below that the deceased was killed after rape, and her pubic hair and vaginal smear were sent to FSL along with the nails and pubic hair of the accused-appellant for forensic and pathological examination. He also submitted that postmortem of the body of the deceased was conducted and seven anti-mortem injuries is found on the body of the deceased.

(35) Learned Government Advocate has also submitted that the accused-appellant was medically examined and smegma was present on his genital part and the abrasion was also found and the colour of the abrasion is bluish black due to force penetration. He also submitted that the deceased was mentally retarded and the offence comes into the category of rarest of the rare cases as the twelve year's old mentally retarded girl was raped and thereafter, murdered. He also relied on the decision of ***Hon'ble Supreme Court*** in the case of ***Laxman Naik Vs. State of Orissa*** reported in ***(1994) 3 SCC 381, Dhananjoy Chatterjee @ Dhana vs. State of West Bengal reported*** in ***(1994) 2 SCC 220*** and ***Shivaji @ Dadya Shankar Alhat Vs. State of Maharastra reported in (2008) 15 SCC 269.***

(36) Considering the arguments of the learned counsel for the appellants as well as learned Government Advocate and going through the records, it is evident that the proseuction examined four sets of eight witnesses, which are given as under:-

1. Relation of the deceased and witnesses of facts: Prem Nath Singh (father of the deceased) PW-1 and Smt. Siyavati (mother of the deceased) PW-7.

2. Last seen witnesses: Vinay Prakash (PW-2) and Mohd. Khaleel (PW-3).

3. Experts who conducted medical and postmortem of the deceased: Dr. Brijesh Kumar Srivastava (PW-4) and Dr. Shipra Singh (PW-5).

4. Police officers who conducted the investigation and prepared Chick F.I.R.: Constable Ram Raj (PW-6) and M.S. Khan (Investigating Officer) PW-8.

(37) It is evident that as per the prosecution case, F.I.R. was lodged on the written complaint of PW-1 Prem Nath Singh (father of the deceased), in which he categorically mentioned that his younger daughter went out from her home at 02:00 p.m., but she did not come back, as a result, search was started and later on, her dead body was found under the black berry tree in the grove of Pratap Singh situated in the southern side of the village; thereafter, the F.I.R. was lodged on 30.03.2013 and the written complaint was proved by him as Ext. Ka-1. Later on, inquest of the body of the deceased was conducted by M.S. Khan (PW-8) and the inquest report was prepared as Ext. Ka-2, and in the inquest report no article has been mentioned which was found near the body of the deceased, as in the inquest report it is mentioned that the inquest was conducted in the light of seven petromax and head light of one tractor in the night, but neither the leggings, under garments and sleepers of the deceased nor notebook of the accused was recovered. On the next date, site plan was prepared by the Investigating Officer and he found leggings, under garments and sleepers of the deceased from the place of incident and thereafter, the statement of Vinay Prakash (PW-2) and Mohd. Khaleel (PW-3) was recorded by the Investigating Officer under

Section 161 Cr.P.C., in which they stated that the accused-appellant was seen by them near the grove of Pratap Singh. The accused-appellant was taken into custody on 01.04.2013 and he confessed the crime as deposed in the statement deposed before the trial court that on his call, the deceased came in the grove where he raped her and when she told him that she will inform about the incident to her family members, then he strangulated her throat and dragged her body under the black berry tree with the intention to hide, and he also stated that during the course of incident, his notebook fell down at the place of incident and suggested PW-8 that the same could be recovered from the place of incident, then the recovery of notebook was made; but the notebook was not sent to the forensic laboratory for verifying the handwriting found in the notebook.

(38) It is also evident that PW-7 Smt. Siyavati (mother of the deceased) has categorically stated in her statement that the deceased went out at 02:00 p.m. from her house, and Vinay Prakash (PW-2) has categorically stated in his statement that on 30.03.2013, he was coming back after watching his agricultural field in between 02:00-02:30 p.m. then he saw that accused-appellant was coming out from the grove of Pratap Singh and going towards the village and after seeing him, the accused started moving fast, but he did not notice his activities and went to his home; and he also stated that the body of the deceased was found in the grove of Pratap Singh at 08:00 p.m., then he believed that there is a possibility for committing the crime by the accused-appellant and this fact was also told to the family members of the deceased as well as Sub Inspector. The relevant part of the statement of PW-2 is being reproduced as under:-

"दिनांक 30 मार्च 2013 की घटना है। मैं अपने खेत देखकर करीब दिन में दो ढाई बजे वापस घर लौट रहा था। कि देखा कि मेरे गांव का उभन यादव उर्फ अभय कुमार यादव प्रताप सिंह की बाग से निकल कर गांव के पश्चिम खलिहान होकर गांव की तरफ जा रहा था। जब उसने मुझे देखा तो और तेजी से भागने लगा। लेकिन उस समय मैंने उसके इस क्रिया कलाप पर कोई ध्यान नही दिया और अपने घर चला गया। गांव आने पर पता चला कि प्रेमनाथ सिंह की लड़की कु0 श्रेया उर्फ ज्योति सिंह जो कुछ हल्के दिमाग की थी। घरसे खेलने के लिए निकली थी और उसका पता नही चल रहा था। परिवारी जन के तलाश करने पर उसी दिन प्रताप सिंह की बाग में श्रेया की लाश रात में करीब 8 बजे मिली थी। तब मुझे इस बात काविश्वास हुआ कि हो सकता है कि यह घटना हाजिर अदालत अभियुक्त उभन यादव ने किया है। तो मैंने इस बात का खुलासा श्रेया के घरवालों व अन्य लोगो से किया था। और यह बात मैंने दरोगा जी से भी बतायी थी। .....

मैं उनके परिवार का नही हूँ **लाश ढूढ़ने में गांव के लोग थे। हम भी ढूढ़ रहे थे जब हल्ला हुआ कि लाश मिल गयी तो हम लोग दौड़करगये तो देखा। हम प्रेमनाथ से अलग लड़की को ढूढ़ रहे थे। जब सबलोग इकट्ठा हो गये तो प्रेमनाथ से मुलाकात हुई थी। उतनी समय मैने प्रेमनाथ को उभन के किया कलाप के बारे में नही बताया। जब घर गये तब उभन के बारे में बताया था।** उस समय सभी रो चिल्ला रहे थे इसलिए बताना उचित नही समझा। लाश के आस पास पुलिसवालो को मेरे सामने कोई वस्तु बरामद नही हुआ था। मैं देखकर चला आया था। घटना के सुबह दरोगा जी आये थे। दरोगा जी ने मेरा बयान लिया था। दरोगा जी के अलावा उभन को देखने वाली बात मैंने प्रेमनाथ को बतायी थी। "

(39) It is also evident that Mohd. Khaleel (PW-3) also stated before the trial court that on the date of incident, he was working in the agricultural field of Pawan Kumar along with the children since 09:00 a.m. to 05:30 p.m. and in between 01:30 - 02:00 p.m., accused-appellant passed nearby the field in which he was working and went in the grove of Pratap Singh; and he also stated that the grove of Pratap Singh is situated 150 mt away from the field in which he was working and when the body of the deceased was found, then he also went to the place of incident but he did not speak to the informant about the

aforesaid incident. On the next date he stated to the Investigating Officer that Ubhan Yadav was going towards the grove of Pratap Singh. The relevant para of the statement of PW-3 is reproduced as under:-

''आज से लगभग सात माह पहले की बात है। मैं अपने बच्चों के साथ पवन कुमार के खेत में मजदूरी पर पिपरमेन्ट लगा रहा था। **उस दिन समय लगभग डेढ़ दो बजे दिन में उस खेत से होकर मेरे गांव का उभन यादव उर्फ अभय कुमार यादव निकला था। और प्रताप सिंह की बाग में गया था।** जब मैं खेत में काम कर रहा था तो उस समय गांव के पवन कुमार सिंह भी मौजूद थे। जब मैं खेत से करीब शाम पांच बजे घर आया तो मालूम हआ कि मेरे गाव के प्रेमनाथ सिंह की लड़की श्रेया सिंह उर्फ ज्योति सिंह गांव में ही कहीं खो गयी है। प्रेमनाथ सिंह व उनके परिवार के लोग श्रेया सिंह की तलाश कर रहे थे तो रात करीब 8 बजे कु0 श्रेया सिंह की लाश प्रताप सिंह की बाग में जामुन के पेड़ के नीचे मिली थी। रात में पुलिस वाले घटना स्थल पर आये थे। दूसरे दिन जब मेरी पुलिस वालो से मुलाकात हुयी तो मैंने पुलिस वालो को बताया था कि कल मैने उभन यादव अभियुक्त हाजिर अदालत को प्रताप सिंह की बाग में दोपहर के समय जाते देखा था। मुझे पूरा विश्वास है कि उभन यादव ने ही कु0 श्रेया सिंह को बेइज्जत करके उसकी हत्या की होगी।

जिस समय मैं पिपरमेन्ट लगा रहा था उस समय **मेरे साथ छोटे बच्चे थे। जहां मैं पिपरमेन्ट लगा रहा था वहां से प्रताप सिंह की बाग करीब 150 मीटर होगी। मैंने सुबह 9 बजे से शाम साढ़े पांच बजे तक पिपरमेन्ट लगायी थी।**

.....

लड़की की लाश सवा आठ बजे रात में मिली थी। जब लड़की की लाश मिली तो सब लोग देखने गये थे और मैं भी गया था। मैंने वादी के घरवालो को नही बताया था कि लाश मिली है। मैंने दूसरे दिन दरोगा जी को बताया था कि मैंने उभन यादव को जाते देखा था। ''

(40) As in the present case, PW-1 Prem Nath Singh and PW-7 Smt Siyawati (parents of the deceased) have categorically deposed that at 02:00 p.m., deceased went out to play; and Vinay Prakash (PW-2) deposed that on the date of incident at 02:00 - 02:30 p.m. when he was coming back after watching his agricultural field, he saw that accused-appellant was coming out from the grove of Pratap Singh and going towards village; and Mohd. Khaleel (PW-3) deposed that he was working in the agricultural filed of Pawan Kumar along with his children and planting the peppermint then he saw that in between 01:30 - 02:00 p.m. accused-appellant was going towards the grove of Pratap Singh, and he also stated that he was working in the filed since 09:00 a.m. to 05:30 p.m., but he has not stated that he heard any noise or crying of the deceased, and he also stated that the grove of Pratap Singh is situated 150 m away from the field in which he was working.

(41) In such circumstances, the prosecution story is contradictory from the statement of PW-2 Vinay Prakash, as when PW-2 admitted that accused-appellant was going towards the village in between 02:00 - 02:30 p.m. then there is no probability of involvement of the accused-appellant in the alleged incident; and the learned court below failed to deal the statement of PW-1, PW-2, PW-3 and PW-7 as the statements of PW-1, PW-2, PW-3 and PW-7 are discussed by the learned trial court at page 16-17, in which it is mentioned that the deceased went out from her house at 02:00 p.m. and at 02:00 - 02:30 p.m., the accused was seen by PW-2 when he was coming back to village from the grove of Pratap Singh, but this issue was not dealt and decided by the trial court. The relevant part of the findings of the court below in relation to Vinay Prakash (PW-2), Mohd. Khaleel (PW-3) and Smt. Siyavati (PW-7) are being reproduced as under:-

''जिससे इस साक्षी के साक्ष्य पर अभियुक्त उभन यादव उर्फ अभय कुमार यादव को **ढाई बजे दिन में**

प्रताप सिंह की बाग से निकल करगांव के पश्चिम खलिहान से होकर गांव की तरफ जाते हुए देखने मेंकोई सन्देह किया जा सके। साक्षी ग्रामीण परिवेश का रहने वाला है।साक्षी द्वारा कहा गया है कि उस समय उसके खेत में सरसों बोई थी। प्रायः लोग दोपहर में अपने खेतों में निगरानी के लिए जाते हैं। साक्षी का साक्ष्य प्राकृतिक एवं विश्वसनीय है।

साक्षी मो0 खलील पी0डब्लू0–3 ने अपने साक्ष्य में कहा है कि आज से लगभग सात माह पहले अपने बच्चों के साथ पवन कुमार के खेत में मजदूरी पर पिपरमेन्ट लगा रहा था। उस दिन समय लगभग डेढ़ दो बजे दिन में उस खेत से होकर मेरे गांव का उभन यादव उर्फ अभय कुमार यादव निकला था और प्रताप सिंह की बाग में गया था।उस समय पवन सिंह भी मौजूद था। इस साक्षी ने कहा है कि जब शाम को घर आया तो वादी की लड़की के गुम होने की खबर मिली तथा आठ–साढ़े आठ बजे लड़की का शव प्रताप सिंह की बाग से बरामद हुआ। बाद में इस साक्षी के समक्ष बचाव पक्ष से एमीकस क्यूरी द्वारा यह सुझाव रखा गया है कि वह वादी के बचाव में झूठी गवाही दे रहा है। गवाह द्वारा इस सुझाव कोगलत बताया गया है कि उसने कुछ नहीं देखा। इस सुझाव को भी गलत बताया गया है कि गांव की पार्टी बन्दी व रंजिश के कारण अभियुक्त को झूठा फंसा दिया। इस साक्षी की जिरह में भी ऐसा कोईसाक्ष्य नही है जिससे साक्षी के घटना के दिन पवन कुमार के खेत मेंपिपरमेन्ट लगाने तथा डेढ़–दो बजे दिन में उस खेत से होकर उभनयादव उर्फ अभय कुमार के निकल कर प्रताप सिंह की बाग में जाने पर सन्देह किया जा सके। इस साक्षी का साक्ष्य भी प्राकृतिक, प्रासंगिक व नैसर्गिक है। साक्षी ग्रामीण परिवेश का रहने वाला है। मजदूरी पेशा व्यक्ति है। साक्षी का साक्ष्य विश्वसनीय है। ''

(42) It is well settled by the ***Hon'ble Supreme Court*** in the cases of***Gargi vs. State of Haryana (supra), Chandmal vs. State ofRajasthan (supra), State of U.P. vs. Hari Mohan (supra), RajKumar Singh vs. State of Rajasthan (supra), Ganpat Singh Vs.State of M.P. (supra), Baiju Kumar Soni vs. State of Jharkhand(supra), Rajendra vs. State (NCT of Delhi) (supra), HanumantGovid Nargundkar vs. State of M.P. (supra), Shivaji SahabraoBobade vs. State of Maharastra (supra), CBI vs. Mahender SinghDahiya (supra), Ramesh Harijan vs. State of U.P. (supra), SujitBiswas vs. State of Assam (supra), Anjan Kumar Sarma vs. Stateof Assam (supra) and Kali Ram vs. State of Himanchal Pradesh(supra)*** that to prove the commission of offence beyond reasonabledoubt based on circumstantial evidence an unbroken chain ofcircumstances pointing to the guilt of the accused alone has to beestablished and when there is no direct or ocular evidence of crime,the guilt can be proved by the circumstantial evidence, but then,circumstances from which conclusion of guilt must be drawn mustbe fully proved and be conclusive in nature to fully connect theaccused with the crimes. All links in the chain of circumstancesmust be prove beyond reasonable doubt and the provedcircumstances must be consistent only with the hypothesis of guiltof the accused alone and none else, as also inconsistent with hisinnocence. The relevant para of the judgment of ***Hon'ble SupremeCourt*** in the case ***Kali Ram Vs. State of Himachal Pradesh(supra)*** is being reproduced as under:-

"25. Another golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. This principle has a special relevance in cases wherein the guilt of the accused is sought to be established by circumstantial evidence."

(43) As it is evident that the postmortem of the deceased was conductedby Dr. Brijesh Kumar Srivastava (PW-4) and Dr. Shipra Singh(PW-5) and seven ante-mortem injuries were found on the body ofthe deceased, and it is also evident from the postmortem report(Ext.

Ka-3) that no ante-mortem injury was found on the genitalparts of the deceased as the hymen was torned and Vagina admitstwo finger; and PW-4 deposed that no injury was found either onthe thigh or in the genital part of the deceased; PW-4 also statedthat accused was medically examined and smegma was foundpresent with abrasion in blue and black color over the glans and heopined that there is a possibility that due to intercourse with aminor such injury may occur on the genital part of the accused dueto friction and that the above injury was two and a half to threedays' old, but on the other side PW-5 Dr. Shipra Singh opined thathymen was torn and two fingers admit in vagina, therefore, it showsthat abrasion found on the Genital of the accused-appellant do notsupport the prosecution case, in case vagina of the deceased wasnarrow then injuries must be also there.

(44) Report of the Forensic Science laboratory was discussed by the trial court at page 20-21 of the judgment and mentioned that neither any semen nor any spermatozoa was found. As it is evident from the medico-legal report of the accused-appellant that smegma was present, therefore, in case, the offence was committed by the appellant then the spermatozoa was to be found in the FSL report, but the same was not found; and with regard to the matching of the semen, we find it from Taylor's Principles and Practice of Medical Jurisprudence, 2nd Edition (1965) as observed by the ***Hon'ble Supreme Court in the case of Krishan Kumar Malik vs. State of Haryana (2011) 7 SCC 130*** that spermatozoa may retain vitality (or free motion) in the body of a woman for a long period, and movement should always be looked for in wet specimens. The actual time that spermatozoa may remain alive after ejaculation cannot be precisely defined, but is usually a matter of hours. Seymour claimed to have seen movement in a fluid as much as 5 days old. The detection of dead spermatozoa in stains may be made at long periods after emission, when the fluid has been allowed to dry. Sharpe found identifiable spermatozoa often after 12 months and once after a period of 5 years. Non-motile spermatozoa were found in the vagina after a lapse of time which must have been 3 and could have been 4 months. Had such a procedure been adopted by the prosecution, then it would have been a foolproof case for it and against the accused-appellant and the Hon'ble Supreme Court also observed in the aforesaid decision that after incorporation of Section 53-A in Cr.P.C. w.e.f. 23.06.2020, it becomes necessary for the prosecution to go in for DNA test in rape cases, facilitating the prosecution to prove its case against the accused, but in the present case, neither DNA test was examined by the prosecution nor the report of FSL support the prosecution case. The relevant part of the judgment delivered by the ***Hon'ble Supreme Court*** in the case of ***Krishan Kumar Malik vs. State of Haryana (supra)*** is reproduced as under:-

"43. With regard to the matching of the semen, we find it from Taylor's Principles and Practice of Medical Jurisprudence, 2nd Edn. (1965) as under:

"Spermatozoa may retain vitality (or free motion) in the body of a woman for a long period, and movement should always be looked for in wet specimens. The actual time that spermatozoa may remain alive after ejaculation cannot be precisely defined, but is usually a matter of hours. Seymour claimed to have seen movement in a fluid as much as 5 days old. The detection

of dead spermatozoa in stains may be made at long periods after emission, when the fluid has been allowed to dry. Sharpe found identifiable spermatozoa often after 12 months and once after a period of 5 years. Non- motile spermatozoa were found in the vagina after a lapse of time which must have been 3 and could have been 4 months."

Had such a procedure been adopted by the prosecution, then it would have been a foolproof case for it and against the accused-appellant."

*"**44**. Now, after the incorporation of Section 53-A in the Criminal Procedure Code w.e.f. 23-6-2006, brought to our notice by the learned counsel for the respondent State, it has become necessary for the prosecution to go in for DNA test in such type of cases, facilitating the prosecution to prove its case against the accused. Prior to 2006, even without the aforesaid specific provision in CrPC the prosecution could have still resorted to this procedure of getting the DNA test or analysis and matching of semen of the appellant with that found on the undergarments of the prosecutrix to make it a foolproof case, but they did not do so, thus they must face the consequences."*

(45) The Investigating Officer placed before the trial court the confessional statement of the accused-appellant and also alleged recovery of notebook. In this regard, we find that Section 25, 26 & 27 of Indian Evidence Act, 1872, provides the law on admissibility of confession statements under Indian law. They provide as follows:-

"25. Confession to police-officer not to be proved. - No confession made to a police officer, shall be proved as against a person accused of any offence.

26. Confession by accused while in custody of police not to be proved against him. -- No confession made by any person whilst he is in the custody of a police-officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.

27. How much of information received from accused may be proved. -- Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police- officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

(46) These provisions reflect the constitutional safeguards provided under Article 20(3) of the Constitution of India, which states that no accused of an offence shall be compelled into being a witness against himself.

(47) The Sections, read with article 20(3) of the Constitution of India make it amply clear that a confession made by any person to a police officer is inadmissible as evidence, except for the singular cases where such statement results in a consequent discovery of fact. It is also not res integra that confessional statements made to the police by the accused cannot be a basis to prove the guilt of the accused. ***[Aghnoo Nagesia v. State of Bihar, AIR 1966 SC 119, Vsanta Sampat Dupare v. State of Maharashtra, (2015) 1 SCC 253, Ishwari Lal Yadav v. State of Chhattisgarh, (2019) 10 SCC 437].***

(48) In the case of ***State of UP v. Deoman Upadhyay, AIR 1960 SC 1125***, a constitution bench of the Hon'ble Apex Court explained the idea behind Sections 24-27 of the Act:

"17. Section 25 and 26 are manifestly intended to hit at an evil, viz., to guard against the danger of receiving in evidence testimony from tainted sources about statements made by persons accused of offences. But these sections form part of a statute which codifies the law relating to the relevancy of evidence and proof of facts in judicial proceedings. The State is as much concerned with punishing offenders who may be proved guilty of committing offences as it is concerned with protecting persons who may be compelled to give confessional statements. If s. 27 renders information admissible on the ground that the discovery of a fact pursuant to a statement made by a person in custody is a guarantee of the truth of the statement made by him, and the legislature has chosen to make on that ground an exception to the rule prohibiting proof of such statement, that rule is not to be deemed unconstitutional, because of the possibility of abnormal instances to which the legislature might have, but has not extended the rule." (emphasis supplied)

(49) On interpretation of Section 27 of the Indian Evidence Act, the ***Hon'ble Apex Court in Bodhraj alias Bodha v. State of Jammu and Kashmir, (2002) 8 SCC 45*** has observed that:-

"18. ...The words "so much of such information" as relates distinctly to the fact thereby discovered, are very important and the whole force of the section concentrates on them. Clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. The ban as imposed by the preceding sections was presumably inspired by the fear of the Legislature that a person under police influence might be induced to confess by the exercise of undue pressure. If all that is required to lift the ban be the inclusion in the confession of information relating to an object subsequently produced, it seems reasonable to suppose that the persuasive powers of the police will prove equal to the occasion, and that in practice the ban will lose its effect. The object of the provision i.e. Section 27 was to provide for the admission of evidence which but for the existence of the section could not in consequences of the preceding sections, be admitted in evidence. It would appear that under Section 27 as it stands in order to render the evidence leading to discovery of any fact admissible, the information must come from any accused in custody of the police.... The basic idea embedded in Section 27 of the Evidence Act is the doctrine of confirmation by subsequent events. The doctrine is founded on the principle that if any fact is discovered as a search made on the strength of any information obtained from a prisoner, such a discovery is a guarantee that the information supplied by the prisoner is true. The information might be confessional or non-inculpatory in nature but if it results in discovery of a fact, it becomes a reliable information." (emphasis supplied)

(50) Therefore, it is clear that in the event that the requirement of Section 27 of the Act are met with i.e. (1) a fact is discovered (2) discovery is in consequence of the confession statement, then the part of the statement that relates to the fact discovered becomes admissible in evidence.

(51) It also fairly settled that interpretation that the "fact discovered" envisaged in the section embraces the place from which the object was produced, the knowledge of the accused as to it, but the

information given must relate distinctly to that effect. ***[State of Maharashtra v. Damu, (2000) 6 SCC 269, State of Punjab v. Gurnam Kaur, (2009) 11 SCC 225, Bhagwan Dass v. State (NCT) of Delhi, (2011) 6 SCC 396, Rumi Bora Dutta v. State of Assam, (2013) 7 SCC 417]***

(52) It is also settled position that Section 27 only becomes applicable when the confession statement leads to the discovery of a new fact. In Madhu v. State of Kerala, (2012) 2 SCC 399, the Hon'ble Apex Court clarified that:

"47. ...The exception postulated under Section 27 of the Indian Evidence Act is applicable only if the confessional statement leads to the discovery of some new fact. The relevance under the exception postulated by Section 27 aforesaid, is limited "...as it relates distinctly to the fact thereby discovered....'. The rationale behind Section 27 of the Indian Evidence Act is, that the facts in question would have remained unknown but for the disclosure of the same by the accused."

(53) In ***Charandas Swami v. State of Gujarat, (2017) 7 SCC 177***, the ***Hon'ble Apex Court*** summarized the principles under Section 27:

"59. In our view, the decision in the case of Navjot Sandhu (Supra) ***[State (NCT of Delhi) v. Navjot Sandhu alias Afsan Guru, (2005) 11 SCC 600]*** *has adverted to all the previous decisions and restated the legal position.*

"121. The first requisite condition for utilising Section 27 in support of the prosecution case is that the investigating police officer should depose that he discovered a fact in consequence of the information received from an Accused person in police custody. Thus, there must be a discovery of fact not within the knowledge of police officer as a consequence of information received. Of course, it is axiomatic that the information or disclosure should be free from any element of compulsion. The next component of Section 27 relates to the nature and extent of information that can be proved. It is only so much of the information as relates distinctly to the fact thereby discovered that can be proved and nothing more. ...The rationale behind this provision is that, if a fact is actually discovered in consequence of the information supplied, it affords some guarantee that the information is true and can therefore be safely allowed to be admitted in evidence as an incriminating factor against the accused....

60. This Court has restated the legal position that the facts need not be self-probatory and the word "fact" as contemplated by Section 27 is not limited to "actual physical material object". It further noted that the discovery of fact arises by reason of the fact that the information given by the Accused exhibited the knowledge or the mental awareness of the informant as to its existence at a particular place. In paragraph 128, the Court noted the statement of law in Udai Bhan (Supra) **[Udai Bhan v. State of UP, 1962 Supp (2) SCR 830]** *that, "A discovery of a fact includes the object found, the place from which it is produced and the knowledge of the Accused as to its existence." (emphasis supplied)*

(54) The presumption of certain facts by the Courts in the absence of direct evidence of an offence has been an accepted practice. However certain principles guide such exercise of such

presumption. The presumption must be an inference of fact drawn from another proved fact that is likely to flow as a common course of natural events, human conduct and public/private business vis-avis the facts. The Courts in drawing such presumption must look at the facts from an angle of common sense and common experience of man.

(55) The ***Hon'ble Apex Court in Limbaji v. State of Maharashtra, (2001) 10 SCC 340*** observed that:

"9. ...A presumption of fact is a type of circumstantial evidence which in the absence of direct evidence becomes a valuable tool in the hands of the Court to reach the truth without unduly diluting the presumption in favour of the innocence of the accused which is the foundation of our Criminal Law. It is an inference of fact drawn from another proved fact taking due note of common experience and common course of events. Holmes J. in Greer v. US [245 USR 559] remarked "a presumption upon a matter of fact, when it is not merely a disguise for some other principle, means that common experience shows the fact to be so generally true that courts may notice the truth". ... Section 114 enjoins:"the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to facts of the particular case." Having due regard to the germane considerations set out in the Section, certain presumptions which the Court can draw are illustratively set out. It is obvious that they are not exhaustive or comprehensive. The presumption under Section 114 is, of course, rebuttable. When once the presumption is drawn, the duty of producing evidence to the contra so as to rebut the presumption is cast on the party who is subjected to the rigour of that presumption. Before drawing the presumption as to the existence of a fact on which there is no direct evidence, the facts of the particular case should remain uppermost in the mind of the Judge. These facts should be looked into from the angle of common sense, common experience of men and matters and then a conscious decision has to be arrived at whether to draw the presumption or not." (emphasis supplied)

(56) In ***State of A.P. v. Vasudeva Rao, (2004) 9 SCC 319,*** reiterating the principles for presumption, noted a word of caution in the judicial exercise of presumption, holding that:

"17. ...Law gives absolute discretion to the Court to presume the existence of any fact which it thinks likely to have happened. In that process the Court may have regard to common course of natural events, human conduct, public or private business vis-a-vis the facts of the particular case. The discretion is clearly envisaged in Section 114 of the Evidence Act. 18. ...While inferring the existence of a fact from another, the Court is only applying a process of intelligent reasoning which the mind of a prudent man would do under similar circumstances. Presumption is not the final conclusion to be drawn from other facts. But it could as well be final if it remains undisturbed later. 19. ...Unless the presumption is disproved or dispelled or rebutted the Court can treat the presumption as tantamounting to proof. However, as a caution of prudence we have to observe that it may be unsafe to use that presumption to draw yet another discretionary presumption unless there is a

statutory compulsion. This Court has indicated so in Suresh Budharmal Kalani v. State of Maharashtra, (1998) 7 SCC 337 "A presumption can be drawn only from facts and not from other presumptions by a process of probable and logical reasoning"." (emphasis supplied)

(57) Applying the aforesaid principles, can it be said that the confessional statement led to discovery of any new fact. Well, there is nothing on record to establish the same as the FSL Report does not support the prosecution case.

(58) The decision of the trial court suffers from an error in appreciation of principles of evidentiary law. In ***Ram Chander v. State of Haryana, (1981) 3 SCC 191***, the Hon'ble Apex Court put to itself, the question of the role of a judge trying a criminal case. The Court observed that:

"2. ...If a criminal court is to be an effective instrument in dispensing justice, the presiding judge must cease to be a spectator and a mere recording machine. He must become a participant in the trial by evincing intelligent active interest by putting questions to witnesses in order to ascertain the truth."

(59) This was the reason for giving wide powers to explore very avenue and discover the truth to the presiding judge. The Court further observed that the Court therefore had to actively participate in the trial to elicit the truth and to protect the weak and the innocent, at the same time balancing the fact that it must not assume the role of the prosecutor. Using Lord Dennings' words, the Court in the preceding decision held:

"4. ... The Court, the prosecution and the defence must work as a team whose goal is justice, a team whose captain is the judge. The judge, like the conductor of a choir, must, by force of personality, induce his team to work in harmony; subdue the raucous, encourage the timid, conspire with the young, flatter and old."

(60) This has been reiterated in ***State of Rajasthan v. ANI, (1997) 6 SCC 162***, where the ***Hon'ble Apex Court*** yet again held that it was the power and duty of the trial court to put any question to the witnesses and the parties at any point in order to ascertain the and discover the relevant facts. The power given under Section 165 of the Evidence Act was intended to be an unbridled power to the courts only for the reason that necessity for eliciting the truth is primary in a criminal trial.

"As upheld by the Hon'ble Apex Court, the role of the higher courts is also to point out errors in law and to lay down jurisprudence to guide the decision-making of the lower courts. Keeping this in mind we have reiterated the principles that ought to have been followed by judicial officers in their decisions, more so in their capital punishment sentencing. A decision without appreciation of principles of law and facts leads to a travesty of justice. We hope and expect these principles are taken cognizance in all decisions of the courts."

(61) As we find that the charges were framed by the trial court on 30.07.2013 and on the same day, the learned Amicus Curiae was appointed to defend the accused-appellant, which reveals that at the time of framing of charges, learned Amicus Curiae was not in position to place his submissions, as no time was given to him

by the court below as provided under Section 227 of Cr.P.C. It also reveals from the record that learned Amicus Curiae did not make any request for time for placing his submissions, therefore, the legal aid provided to the accused-appellant by the trial court was not real and effective. As it is held by the Hon'ble Apex Court in the case of ***Anokhilal Vs. State of Madhya Pradesh (supra)*** that the legal aid provided to the accused person through Amicus Curiae must be real and effective.

(62) As we also find that the prosecution tried to develop a case that the abrasions found on the Prepuce and Glans (Genitals) of the accused-appellant is due to intercourse with the child having very narrow vagina; in case, the prosecution case is admitted that the injury on the genital part of the accused-appellant is caused due to rape with the minor having small vagina, then as per the ***Modi's Medical Jurisprudence & Toxicology, 22nd Edition***, an abrasion or laceration may be discovered on the Prepuce or Glans penis, but more often on the fraenum, due to forcible introduction of the organ into the narrow vagina of a virgin, especially of a child, but it is not necessary that there should always be marks of injuries on the penis in such cases; bruising and laceration of the external genitals may be present with redness, tender swelling and inflammation; in nubile virgins, the hymen, as a result of completed sexual intercourse, is usually lacerated, having one or more radiate tears, (more so in posterior half) the edges of which are red, swollen and painful, and bleed on touching, if examined within a day or two after the act. These tears heal within five or six days and after eight to ten days, become shrunken and look like small tags of tissue. But in the present case, no such injury is found on the genital parts of the deceased rather PW-5 Dr. Shipra Singh opined two finger admits in vagina of the deceased, therefore, the prosecution story is doubtful.

(63) The other point that the prosecution relied are the statements of circumstantial witnesses namely Prem Nath Singh (PW-1), Vinay Prakash (PW-2), Mohd. Khaleel (PW-3) and Smt. Siyavati (PW-7) that the victim, on the date of incident, went out from her house at 02:00 p.m. and it is undisputed that Vinay Prakash (PW-2) has seen the accused-appellant, on the date of incident, in between 02:00 - 02:30 p.m., coming back from the grove of Pratap Singh; and Mohd. Khaleel (PW-3) has admitted that he was in the agricultural filed which is 150 mt away from the place of incident since 09:00 a.m. to 05:30 p.m., but he has not deposed before the trial court that either he saw the deceased or heard her crying. Therefore, the prosecution story is also doubtful.

(64) As after amendment in the year 2006, under Section 53 A of Cr.P.C. it is obligatory on the part of the prosecution to get the DNA test to nab the actual culprit, but in the present case, the pubic hair and nails of the accused-appellant and two slides of vaginal smear of the deceased along with her pubic hair were also sent for pathological examination but the DNA test was not requested by the Investigating Officer.

(65) It is also relevant to mention here that the Forensic/Pathological examination of Vaginal smear of the deceased was done by the FSL, Lucknow who in turn sent a report which was taken into record by the trial court on 14.03.2014 and on this report, number B31/2 was introduced but it was not exhibited; even then the trial court

considered in the judgment and observed that even no semen or spermatozoa was found, but in the injury alleged, abrasion was found on the genital part of the accused; and the accused-appellant was also seen by the Mohd. Khaleel (PW-3) in between 02:00 - 02:30 p.m. at the place of incident, when he was going towards the village from the place of incident, therefore, the accused-appellant is guilty; but the learned trial court failed to consider the fact that in case, no spermatozoa is found in the FSL examination of slides of vaginal smear then it was obligatory to conduct the DNA test; and the Investigating Agency also failed to comply the mandatory provisions of Section 53A of Cr.P.C. (amended in year 2006) as held by the Hon'ble Supreme Court in the case of ***Krishan Kumar Malik vs. State of Haryana (supra)***, therefore, the prosecution story is not reliable in relation to the manner in which alleged offence has been committed.

(66) As in the case of minor discrepancies found in the investigation, Appellate Court does not interfere in the judgment of trial court but in such a heinous offence, the investigation was done in very casual manner as on the date of incident, the inquest was done in the night in the light of seven petromax and head light of one tractor, and in the inquest report nothing is mentioned in the box that whether any article/item was found at the place of incident, near the body of the deceased, but on the next date, the site plan was prepared and the recovery of pair of leggings, under garments and sleepers of the deceased was shown and on the next date, after arrest of the accused-appellant, recovery of notebook of the accused is shown on the basis of his confessional statement, but the same was not sent to FSL for examination of hand writing of the accused-appellant; and the Investigating Officer also committed blunder by not requesting the DNA test as prescribed by Section 53A of Cr.P.C. (amended in the year 2006) are major lapses. In the case of ***Sunil Kundu and Another vs. State of Jharkhand reported in 2013 (4) SCC 422, the Hon'ble Supreme Court*** held that on the grant of minor lapses or irregularities in investigation acquittal is not permitted but major lapses those impact on the case of the trial cannot be ignored. The relevant para of Sunil Kundu and Another vs. State of Jharkhand (supra) is as under :-

*"**29**.We began by commenting on the unhappy conduct of the investigating agency. We conclude by reaffirming our view. We are distressed at the way in which the investigation of this case was carried out. It is true that acquitting the accused merely on the ground of lapses or irregularities in the investigation of a case would amount to putting premium on the deprecable conduct of an incompetent investigating agency at the cost of the victims which may lead to encouraging perpetrators of crimes. This Court has laid down that the lapses or irregularities in the investigation could be ignored subject to a rider. They can be ignored only if despite their existence, the evidence on record bears out the case of the prosecution and the evidence is of sterling quality. If the lapses or irregularities do not go to the root of the matter, if they do not dislodge the substratum of the prosecution case, they can be ignored. In this case, the lapses are very serious. PW 5 Jaldhari Yadav is a pancha to the seizure panchnama under which weapons and other articles were seized from the scene of offence and also to the inquest panchnama. Independent panchas have not been examined. The*

investigating officer has stated in his evidence that the seized articles were not sent to the court along with the charge-sheet. They were kept in the malkhana of the police station. He has admitted that the seized articles were not sent to the forensic science laboratory. No explanation is offered by him about the missing sanha entries. His evidence on that aspect is evasive. Clothes of the deceased were not sent to the forensic science laboratory. The investigating officer admitted that no seizure list of the clothes of the deceased was made. Blood group of the deceased was not ascertained. No link is established between the blood found on the seized articles and the blood of the deceased. It is difficult to make allowance for such gross lapses. Besides, the evidence of eyewitnesses does not inspire confidence. Undoubtedly, a grave suspicion is created about the involvement of the accused in the offence of murder. It is well settled that suspicion, however strong, cannot take the place of proof. In such a case, benefit of doubt must go to the accused. In the circumstances, we quash and set aside the impugned judgment and order [Sunil Kundu v. State of Jharkhand, Criminal Appeal No. 1762 of 2004, decided on 20-8-2007 (Jhar)] . The appellant-accused are in jail. We direct that the appellants A-1 Sunil Kundu, A-2 Bablu Kundu, A-3 Nageshwar Prasad Sah and A-4 Hira Lal Yadav be released forthwith unless otherwise required in any other case."

As the ***Hon'ble High Court in Criminal (Capital) Appeal No.5298 of 2015 (Vinod and Another vs. The State of U.P.),*** vide its judgment and order dated 17.02.2017 issued a direction to the State to make investigation of criminal case more effective, reliable and flawless. The relevant part of the judgment in the case of Vinod and Another vs. The State of U.P. (supra) is reproduced as under:-

"192. In view of the above, as our humble contribution, in order to make investigation of Criminal cases more effective, reliable and flawless We are passing following directions:

(I) All the Investigating Officers shall endeavor/make their best efforts to record the statements of informant, victim/injured and other important witnesses of fact, of the case as far as possible at the earliest and If it is not possible to do so within 24 hours from the registration of First Information Report, they shall furnish separate explanation for late recording of the statement of each witness alongwith statement of the witness concerned.

(II) With a view to curtail delay in recording the statements of informant/victim and witnesses, to curb the growing tendency of the witnesses to disown their earlier statements recorded under Section 161 Cr.P.C. and turning hostile and to ensure their reliability, the Investigating Officer and State Government shall without fail inform the informant and all the witnesses that they may submit their evidence by e- mail/speed post or registered post on affidavit, sworn before the Oath Commissioner or Public Notary. If such affidavits are filed by the informant and the witnesses, same will be received, taken into consideration and needful will be done in respect of those by the I.O. In such cases, I.O. will also be at liberty to make further queries with the informant/witnesses if need arises to do so.

(III) Copies of statements recorded under Section 161 Cr.P.C. shall be simultaneously provided by the Investigating Officer to the first informant and witnesses with intimation that if they have any objection in respect of their

statement or any discrepancy is found in the same, it shall be brought to the notice of the I.O. at the earliest, preferably within a week alongwith supporting evidence. An endorsement to this effect shall also be made by the I.O. in the case diary.

(IV) The above directions (I), (II) and (III) will also apply in respect of recording statements of accused and defence witnesses.

(V) All the Investigating Officers will collect each and every material and piece of evidence available at the place of incident and at the earliest and if not done so within 24 hours, they will furnish their explanation to that effect.

(VI) I.O. will prepare site plan of each and every place connected with the crime showing all the necessary details thereof like distance of witness/injured/aggressor etc.

VII) As directed by Hon'ble Apex Court in Prakash Vs. State of Karnataka (supra), the prosecution must lay stress on scientific collection and analysis of evidence, particularly since there are enough methods of arriving at clear conclusions based on evidence gathered. In view of above, all relevant material and evidence collected from the site, shall be sent for Hand Writing Expert, Ballistic Expert, Forensic Science Laboratory, Finger Print Expert, D.N.A. Expert etc. as the case may be, by the I.O. for obtaining expert opinion/report in respect to such articles collected from the place of incident.

(VIII) Where ever it is possible and necessary the I.O. will collect 'Call Details Record' (C.D.R.) of Mobile Phones/Land Line phones of the victim/witnesses/accused as the case may be, footage of C.C.TV cameras available on the spot/near by locations and put phone numbers/mobile numbers of suspected persons likely to be involved in the offence concerned on surveillance, without any undue delay.

(IX) In all cases I.O. will adhere strict compliance of various provisions of Cr.P.C., Police Act and the Regulations related to the 'investigation'.

(X) Superior Police Authorities shall develop effective monitoring system to ensure strict compliance of relevant rules, provisions and above directions by the Investigating Officers during investigation. In the cases of willful and intentional violation of the aforesaid by the Investigating Officer concerned same shall be cured at the earliest and appropriate action may be taken against the erring Investigating Officer.

(XI) The State Government shall ensure vide publicity of these directions by its publication in the news papers, electronic media and display on notice boards at the offices of superior Police Officers.

(XII) A copy of this order shall be sent to Chief Secretary and Secretary (Home), Government of Uttar Pradesh for compliance of this order. They will submit their compliance report on affidavit within 3 months from the date of receipt of this order, to this Court.

(XIII) The Registrar General of this Court is directed to send a copy of this order to the Chairmen of all the District Legal Services Authority and the State Legal Services Authority for vide publicity of above directions."

(67) As it is also evident that the statement of the accused-appellant under Section 313 Cr.P.C. was taken by the trial court by framing eleven questions on 08.08.2014, but prosecution evidence available on record was not put to the accused-appellant properly; as in Question

No.1, it is not mentioned that the deceased went out from her home at 02:00 p.m on the date of incident, in Question No.2 it is mentioned that on the date of incident at about 02:30 p.m., PW-2 Vinay Prakash has seent the accused-appellant coming out from the grove in question and in the Question No.3, in relation to the deposition of PW-3 Mohd. Khaleel, in which time is not explained properly and it is also not stated that he was working in the agricultural field since 09:00 a.m. to 05:30 p.m., and in question no. 3 this fact was not mentioned which is most relevant in the identical manner, and other questions based on deposition of other witnesses are having major lapses. The contents of statement of accused-appellant recorded under Section 313 Cr.P.C. prepared by the trial court and the reply of the accused-appellant, who was represented by the Amicus Curiae, in relation to them is as under:-

बयान मुल्जिम अंतर्गत धारा 313 द0प्र0सं0

अभियुक्त उभनयादव पुत्र सीताराम

आयु– 35 वर्ष लगभग पेशा खेती निवासी इसरेहना

थाना देवा जिला–बाराबंकी

प्रश्न 1. अभियोजन साक्षी सं. 1 प्रेमनाथ सिंह ने साक्ष्य दिया है कि मेरी लड़की श्रेया घटना वाले दिन घर से कहीं गायब हो गयी थी जिसकी तलाश की गयी तो उसकी लाश गांव के बाहर जंगल में मिली जिसकी रिपोर्ट इस साक्षी ने थाना देवां में दर्ज करायी। इस साक्षी ने न्यायालय पर तहरीर प्रदर्श क–1 व पंचायतनामा प्रदर्श क–2 को साबित किया है, इस सम्बन्ध में आपको क्या कहना है?

उत्तर– रिपोर्ट मेरे विरूद्व नही है। वादी का बयान न्यूट्रल है।

प्रश्न 2. अभियोजन साक्षी सं. 2 विनय प्रकाश ने न्यायालय पर साक्ष्य दिया है कि घटना वाले दिन दिन में करीब

घटना स्थल वाली बाग से निकल कर जाते हुए देखा था और उसके जाने के बाद उसी जंगल में मृतका की लाश बरामद हुई थी, इस सम्बन्ध मे आपको क्या कहना है?

उत्तर– अभियोजन साक्षी 2 वादी था मेली मददगार है इसलिए गवाही दिया है।

प्रश्न .3. अभियोजन साक्षी सं. 3 मो0 खलील ने साक्ष्य दी है कि मेरे गांव के प्रेमनाथ सिंह की लड़की श्रेया कहीं गायब हो गयी थी, उसकी लाश गांव के बाहर बाग में मिली थी, मौके पर पुलिस वाले आये थे, तब मैंने बताया था कि मैन आपको घटना स्थल वाली बाग में दिन में दोपहर के समय जाते हुए देखा था, इस सम्बन्ध में आपको क्या कहना है?

उत्तर. साक्षी सं0 3 वादी का जेविया गवाह व मजदूर है इसलिए गवाही दिया। घटना वाले दिन वह पवन कुमार क खेत में पेपरमिन्ट लगा रहा था। पवन कुमार वादी के परिवार का है।

प्रश्न 4. अभियोजन साखी सं0 4 डाक्टर बृजेश कुमार श्रीवास्तव ने साक्ष्य दी है कि मैने मृतका श्रेया की लाश का पोस्ट मार्टम किया था तथा आपके गुप्तांगो का परीक्षण किया था। इस साक्षीने पोस्ट मार्टम रिपोर्ट प्रदर्श क 3 व आपकी मेडिकल रिपोर्ट प्रदर्श क 4 को साबित किया है, इस सम्बन्ध में आपको क्या कहना है?

उत्तर– सही है।

प्रश्न 5. अभियोजन साक्षी सं0 5 डाक्टर शिप्रा सिंह ने साक्ष्य दी है कि मृतका के पोस्ट मार्टम के समय मैं भी मौके पर मौजूद थी। उसके गुप्तांगो का परीक्षण मेरे द्वारा किया गया था, जिसे डाक्टर वी0के0 श्रीवास्तव ने अपनी पोस्ट मार्टम रिपोर्ट में अंकित किया, इस सम्बन्ध में आपको क्या कहना है?

उत्तर– डा0 शिप्रा सिंह का साक्ष्य स्वीकार्य है।

प्रश्न 6. अभियोजन साक्षी सं0 6 हेड कां0 रामराज ने साक्ष्य दी है कि इस मुकदमे की चिक व कायमी मेरे द्वारा लिखी गयी थी। इस साक्षी ने चिक प्रदर्श क 5 व कायमी जी0डी0 प्रदर्श क 6 को न्यायालय में साबित किया। इस सम्बन्ध में आपको क्या कहना है?

उत्तर– हे0का0 राम राज सिंह ने रिपोर्ट लिख वह स्वीकार्य है।

प्रश्न 7. अभियोजन साक्षी सं0 7 श्रीमती सियावती मृतका की मां ने साक्ष्य दी है कि मेरी लड़की घटना वाले दिन दिन में गायब हो गयी थी, जिसकी लाश रात में प्रताप सिंह की बाग में मिली थी। इस सम्बन्ध में आपको क्या कहना है?

उत्तर– श्रीमती सियाती का बयान दुर्भावनापूर्ण है वह आखिरी बयान पलट दिया है स्वीकार्य नही है।

प्रश्न 8. अभियोजन साक्षी सं0 8 एच0एच0ओ0 एम0एम0 खान ने साक्ष्य दी है कि इस मुकदमे की विवेचना मेरे द्वारा की गयी थी। दौरान विवेचना मृतका की लाश का पंयातनामा व नक्शा नजरी तथा आपको गिरफ़्तारी करने व साक्षी गण का बयान लेने के उपरान्त आरोप पत्र न्यायालय में प्रेषित किया था। इस साक्षी ने पंचायतनामा प्रदर्श क 7 ता प्रदर्श क 11, नक्शा नजरी प्रदर्श क 12 व क 15 फर्द प्रदर्श क 13, फर्द

डायरी प्रदर्श क 14, आरोप पत्र प्रदर्श क 16 तथा परचाजात कपडे वस्तु प्रदर्श 1 ता 10 को न्यायालय पर प्रमाणित किया है, इस सम्बन्ध में आपको क्या कहना है?

उत्तर– साक्षी नं0 8 की विवेचना नियम के प्रतिकूल है नियमानुसार विवेचना नही की है।

प्रश्न 9. आपके विरूद्व मुकदमा क्यों चला?

उत्तर– नाली नाबदान के रंजिश व पुलिस अपनी जिम्मेदारी से बचने के लिए प्रार्थी अभियुक्त को झूठा फंसाया है।

प्रश्न 10. क्या आपको सफाई देनी है?

उत्तर– जी नही।

प्रश्न 11. क्या आपको कुछ और कहना है?

उत्तर– जी नही।

नि0अ0 उभन उर्फ अभय यादव

ह0 अपठनीय

अपर सत्र न्यायाधीश

न्यायालय सं0 1, बाराबंकी

08.08.2014

(68) As the accused-appellant categorically mentioned that due to enmity in between the family members of the deceased and him in relation to water drainage, he has been falsely implicated in the present case by the police only to work out the case to avoid their responsibilities. The circumstances on which the prosecution relied upon has not been put under Section 313 Cr.P.C. to the accused-appellant which prejudice his right to lead effective defence and a fair trial which has caused miscarriage of justice. As it is well settled by the ***Hon'ble Supreme Court*** in the case of ***Mahesh Tigga vs. State of Jharkhand (2020) 10 SCC 108*** that in criminal trial under Section 313 Cr.P.C., it is obligatory on the trial court to explain incriminating evidence against him in question to furnish evidence against his defence. but in the present case, in very casual manner, questions are framed. The ***Hon'ble Supreme Court in Criminal Appeal No.1735-1736 of 2010 (Satbir Singh & Another vs. State of Haryana)*** vide judgment and order dated 28.05.2021 again reiterated the aforesaid principles. The relevant paras of judgment of ***Maheswar Tigga vs. State of Jharkhand (supra) and Satbir Singh & Another vs. State of Haryana (supra)*** are reproduced as under:-

Maheswar Tigga vs. State of Jharkhand (supra)

"9. This Court, time and again, has emphasised the importance of putting all relevant questions to an accused under Section 313 CrPC. In Naval Kishore Singh v. State of Bihar [Naval Kishore Singh v. State of Bihar, (2004) 7 SCC 502 : 2004 SCC (Cri) 1967], it was held to be an essential part of a fair trial observing as follows: (SCC p. 504, para 5)

"5. The questioning of the accused under Section 313 CrPC was done in the most unsatisfactory manner. Under Section 313 CrPC the accused should have been given opportunity to explain any of the circumstances appearing in the evidence against him. At least, the various items of evidence, which had been produced by the prosecution, should have been put to the accused in the form of questions and he should have been given opportunity to give his explanation. No such opportunity was given to the accused in the instant case. We deprecate the practice of putting the entire evidence against the accused put together in a single question and giving an opportunity to explain the same, as the accused may not be in a position to give a rational and intelligent explanation. The trial Judge should have kept in mind the importance of giving an opportunity to the accused to explain the adverse circumstances in the evidence and the Section 313 examination shall not be carried out as an empty formality. It is only after the entire evidence is unfurled the accused would be in a position to articulate his defence and to give explanation to the circumstances appearing in evidence

against him. Such an opportunity being given to the accused is part of a fair trial and if it is done in a slipshod manner, it may result in imperfect appreciation of evidence.""

Satbir Singh & Another vs. State of Haryana (supra)

"22. It is a matter of grave concern that, often, Trial Courts record the statement of an accused under Section 313, CrPC in a very casual and cursory manner, without specifically questioning the accused as to his defense. It ought to be noted that the examination of an accused under Section 313, CrPC cannot be treated as a mere procedural formality, as it is based on the fundamental principle of fairness. This provision incorporates the valuable principle of natural justice- "audi alteram partem", as it enables the accused to offer an explanation for the incriminatory material appearing against him. Therefore, it imposes an obligation on the part of the Court to question the accused fairly, with care and caution. The Court must put incriminating circumstances before the accused and seek his response. A duty is also cast on the counsel of the accused to prepare his defense, since the inception of the trial, with due caution..."

(69) Learned trial court has also observed that the deceased was mentally retarded and the accused-appellant is having a bad character but there are no evidence available on record in these regard.

(70) As the ***Hon'ble Supreme Court in the Case of Reena Hazarika vs. State of Assam (2019) 13 SCC 289*** that unlike prosecution, accused is not required to establish defence beyond all reasonable doubt - accused has only to raised doubts on a preponderance of probability. The relevant of the aforesaid judgment is reproduced as under:-

"22.The entirety of the discussion, in the facts and circumstances of the case, the nature of evidence available coupled with the manner of its consideration, leaves us satisfied that the links in the chain of circumstances in a case of circumstantial evidence, cannot be said to have been established leading to the inescapable conclusion that the appellant was the assailant of the deceased, incompatible with any possibility of innocence of the appellant. The possibility that the occurrence may have taken place in some other manner cannot be completely ruled out. The appellant is therefore held entitled to acquittal on the benefit of doubt. We accordingly order the acquittal and release of the appellant from custody forthwith, unless wanted in any other case."

(71) The Court is conscious of the fact that in the present case, 12 years' old girl has been sexually assaulted and done to death by throttling, but the fact remains that whether it was the accused-appellant who has committed the alleged crime appears to be doubtful. In such circumstances, the Court comes to the conclusion that the manner in which the prosecution tried to establish the execution of crime is doubtful. Hence, the prosecution failed to prove its case beyond reasonable doubt. The incident does not appear to have happened in the manner in which the prosecution want the Court to believe it had happened. Therefore, the accused-appellant becomes entitle for the benefit of doubt and the appeal deserves to be allowed.

(72) For all the aforesaid reasons, we ***allow*** the Criminal Appeal No. 1202 of 2014

filed by accused-appellant ***Ubhan Yadav @ Abhai Kumar Yadav*** and ***set aside*** the judgment of conviction dated 29.08.2014 passed by Shri Satya Prakash Naik, Additional Sessions Judge, Court No.1, Barabanki in S.T. No.266 of 2013 arising out of Case Crime No.101 of 2013, under Sections 302, 201 & 376 I.P.C., P.S. Dewa, District Barabanki, in Criminal Appeal No.1202 of 2014 (Ubhan Yadav @ Abhay Kumar Yadav Vs. State of U.P.).

(73) The Death reference made by the trial court with respect to the accused-appellant - ***Ubhan Yadav @ Abhai Kumar Yadav*** - is also set aside.

(74) The accused-appellant - ***Ubhan Yadav @ Abhai Kumar Yadav*** - is in jail. Let the accused-appellant be released forthwith unless required in any other case.

(75) It is further directed that the appellant namely Ubhan Yadav @ Abhai Kumar Yadav shall furnish bail bond with sureties to the satisfaction of the court concerned in terms of the provision of Section 437-A Cr.P.C.

(76) Let the lower court record along with the present order be transmitted to the trial court concerned for necessary information and compliance forthwith.

(77) 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.

(78) 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)06ILR A88
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.06.2021

BEFORE

THE HON'BLE MUNISHWAR NATH BHANDARI, J.
THE HON'BLE SHAMIM AHMED, J.

Criminal Appeal No. 7507 of 2018
and
Criminal Appeal No. 7755 of 2018

Piyush Kumar Verma ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Sarvesh, Sri Kamlesh Singh, Sri S.K. Verma

Counsel for the Respondent:
A.G.A., Sri Lal Mani Singh, Sri Raghuvir Sharan Singh

(A) Criminal Law - Code of Criminal Procedure, 1973 - Section 374 - Appeals from conviction - Scheduled Castes/Scheduled Tribes (Prevention from Atrocities) Act,1989 - circumstantial evidence - surmises and conjectures.

(B) Criminal Law - Indian Penal Code, 1860 - Section 302 - murder , Section 377 - Unnatural offence - Trial Court made reference of Section 300 I.P.C - whether a case under Section 302 Indian Penal Code is made out - offence under Section 377 Indian Penal Code was committed by the accused (Piyush kumar Verma) - on a girl at the age of 11 years when she was not fully grown - injuries to the deceased have been recorded in the post mortem report - cause of death was due to excessive bleeding and shock - evidence on record proved commission of offence of Section 302 Indian Penal Code by accused **- held - No**

illegality in the finding recorded by the trial Court.(Para - 57)

(C) Criminal Law - Indian Penal Code, 1860 - Section 304A - Causing death by negligence , Section 201 - Causing disappearance of evidence of offence , or giving false information to screen offender - Section 202 - Intentional ommission to give information of offence by person bound - negligence of the accused would not make out a case under Section 202 Indian Penal Code unless their legal obligation is proved - appellants (Sudhir Kumar Verma @ Mukesh Verma and Santosh Kumar Singh) convicted and sentenced for offence under Section 304A and 202 IPC - acquitted under Section 201 and Section 304 IPC - prosecution failed to lead evidence to prove that those two appellants suppressed or disappeared the evidence - trial Court recorded finding about negligence and not for their legal duty - evidence produced by the prosecution does not prove offence under Section 304A IPC by the appellants **- Held -** conviction for the offence under Section 304A and 202 IPC cannot sustain rather they are acquitted for the offence - impugned judgment of trial Court is set aside.(Para - 58,60,61,64)

Criminal appeal (accused-appellant Piyush Kumar Verma) dismissed.

Criminal appeal (Sudhir Kumar Verma @ Mukesh Verma and Santosh Kumar Singh) allowed. (E-6)

List of Cases cited:-

Dalvir Singh Vs St. of U.P., (2004) 5 SCC 334

(Delivered by Hon'ble Munishwar Nath Bhandari, J.)

1. These two appeals have been preferred under Section 374(2) Code of Criminal Procedure against the judgment dated 05.12.2018 passed by Additional Sessions Judge/Special Judge, Scheduled Castes/Scheduled Tribes (Prevention from Atrocities) Act, Kanpur Nagar.

2. The appellant Piyush Kumar Verma has been convicted for the offence under Section 302 and 377 Indian Penal Code while in the connected appeal, appellants Sudhir Kumar Verma @ Mukesh Verma and Santosh Kumar Singh have been convicted for the offence under Section 304A and 202 Indian Penal Code. The appellant Piyush Kumar Verma has been sentenced to life imprisonment with penalty of Rs. 50,000/- for the offence under Section 302 Indian Penal Code and in case of default in payment of penalty, to undergo 03 months additional imprisonment. He has been sentenced to 10 years rigorous imprisonment with penalty of Rs. 25,000/- for the offence under Section 377 Indian Penal Code and in case of default in payment of penalty, to undergo additional sentence of 01 month.

3. The appellants Sudhir Kumar Verma @ Mukesh Verma and Santosh Kumar Singh have been sentenced to 01 year rigorous imprisonment with penalty of Rs. 20,000/- for the offence under Section 304A Indian Penal Code and in case of default in payment of penalty, to undergo 15 days additional imprisonment. They have been further sentenced to 03 months imprisonment with penalty of Rs. 1000/- for the offence under Section 202 Indian Penal Code and in case of default in payment of penalty, to undergo 15 days additional imprisonment. The sentence have been ordered to run concurrently.

4. Learned counsel for the appellants submitted that a first information report bearing No. 1029 of 2010 was registered on a written report of Sandeep Tiwari resident of Shastri Nagar, Kanpur at the instance of Sonu Bhadauria. It was stated that Sonu Bhadauria W/o Hamir Singh is resident of Roshan Nagar. She dropped her daughter

Divya (the deceased) at 07:30 A.M. on 27.09.2010 in the school. The daughter (the deceased) was dropped at her residence at around 01:00 P.M. on 27.09.2010 by the female attendant of the school in critical condition. When the owner of the house in which Sonu Bhadauria was a tenant asked about the condition of the girl, attendant did not disclose any fact. The daughter was undress. Her bloodstained dress was found in the bag and in her private part, cotton and cloth were inserted. The girl was not conscious. Her body turned pale due to excess bleeding from the private part. The daughter was immediately taken to the hospital where she was declared dead and death said to have taken place almost an hour back.

5. On the basis of written report Exhibit A-1, the first information report was registered on the same date, i.e., 27.09.2010 at around 05:45 P.M. for the offence under Section 376, 302 Indian Penal Code against the unknown person. The report (Exhibit A-3) was prepared by Head Constable Pancham Lal and it has been disclosed in "Nakal Rapat" and, accordingly, "Rojnamcha" was prepared.

6. After registration of the first information report, post mortem was conducted, of which a video was prepared. The post mortem of the deceased aged about 11 years was conducted by the Board consists of four doctors. It was on 28.09.2010. The post mortem report was prepared by Dr. Sandeep Srivastava. In the post mortem report, five injuries were reported, out of which, injury no. 4 was old. The hymen of the deceased girl was found intact. No injury was found on vagina, however, her rectum was found lacerated and perforated size 2 x 1.5 cm. It was upto sigmoid colon.

7. The investigation was initially conducted by PW-30 Anil Kumar Singh and, later on, it was transferred to CBCID. After recording statements of the witnesses and collection of the evidence, the charge-sheet for the offence under Section 377, 302, 376(2F), 511 Indian Penal Code was submitted against the accused Piyush Kumar Verma while other accused Chandra Pal Verma, Sudhir Kumar Verma @ Mukesh Verma were charge-sheeted for the offence under Section 201, 202 Indian Penal Code apart from other charges.

8. After receipt of the charge-sheet, cognizance of the offence was taken by the Court of Special C.J.M., Kanpur Nagar. The case was remitted to the Court of Sessions on 09.03.2011 for trial. The trial Court framed the charges against accused Piyush Kumar Verma for the offence under Section 377, 376(2F), 302, 201 Indian Penal Code while charges for the offences under Section 304/34, 109, 201, 202 Indian Penal Code were framed against accused Chandra Pal Verma, Sudhir Kumar Verma @ Mukesh Verma and Santosh Kumar Singh. The trial then commenced, in which, prosecution produced 32 witnesses. 40 documents were exhibited to prove their case. Four Court witnesses were examined. After completion of the prosecution evidence, the statements of the accused were recorded under Section 313 Code of Criminal Procedure. The accused produced two witnesses in defence apart from one document to prove their innocence. After completion of the trial, the accused-appellant Piyush Kumar Verma was convicted for the offences under Section 302, 377 Indian Penal Code while other two appellants, namely, Sudhir Kumar Verma @ Mukesh Verma and Santosh Kumar Singh were convicted for the offences under Section 304A, 202 Indian

Penal Code and sentenced, as mentioned earlier. Chandra Pal Verma was acquitted of the offences.

9. Aggrieved by the judgment of the trial Court, these appeals have been preferred.

10. Learned counsel for the appellants submitted that accused Piyush Kumar Verma was having excellent academic record. He did his Post Graduation in Science with first division. He was not having past history of crime. He has been made victim of unfavourable circumstances. He has been convicted and sentenced for the offence under Section 302, 377 Indian Penal Code without having any evidence against him. The judgment of the trial Court is based on surmises and conjectures. It was a case of circumstantial evidence and without there being a chain of circumstances, the appellants have been convicted.

11. Learned counsel submitted that the appellant Piyush Kumar Verma was not knowing the deceased Divya. He had no interaction with her at any point of time. Therefore, there was no enmity or motive or even intention of the appellant Piyush Kumar Verma for murder of deceased Divya. The appellant Piyush Kumar Verma has still been convicted for the offence under Section 302 Indian Penal Code. Learned trial Court ignored even the definition of "murder" punishable under Section 302 Indian Penal Code.

12. It is further submitted that the appellant Piyush Kumar Verma was running a separate school, different than the school in which incident said to have taken place. His presence at the place of the incident could not be proved by the prosecution for the offence under Section 377, 302 Indian Penal Code yet he has been convicted for those offences by misreading evidence produced by the prosecution.

13. The appellants were falsely implicated due to the political and social rivalry between his father Chandra Pal Verma and Sri Dharamvir Bhadauria, a B.S.P. Leader and brother-in-law of the informant Sonu Bhadauria. Due to political reasons, the Investigating Officer was pressurized to falsely implicate the appellants and, therefore, the entire investigation was manipulated. It is prima-facie proved from the fact that in the recovery memo (Exhibit A-5), two lines were added by manipulating to show the recovery of underwear of the deceased from the place of occurrence. The recovery memo (Exhibit A-5) was signed by Anamika Kushwaha and Mohita Srivastava but they did not endorse last two lines. Thereby, the recovery of the underwear of the deceased from the place of occurrence becomes doubtful yet relied by the trial Court to connect accused Piyush Kumar Verma with the crime.

14. Learned counsel further submitted that the deceased Divya was unwell yet dropped by complainant PW-3 Sonu Bhadauria at the school. The fact about ill-health of the deceased was proved by the statement of prosecution witness Smt. Vimla Devi (PW-4) yet it was ignored by the trial Court. It was also stated that no sperm or semen was found on the skirt of the deceased yet the trial Court has recorded finding about availability of sperm or semen on the skirt ignoring Exhibit A-12 report No. 272 Bio 10. Thus, the finding of learned trial Court is perverse.

15. It is further stated that act of Forensic Science Laboratory, Lucknow was also fraudulent. After collection of blood for

DNA, under the order of the Court, they approached CDFD, Hyderabad for test report without any justified reason and against the Memorandum of Understanding (M.O.U.) with CDFD, Hyderabad. The M.O.U. entered between Forensic Science Laboratory, Lucknow and CDFD, Hyderabad was only for training purposes and, therefore, only the M.O.U. make a mention about collection of 300 blood samples of the population of Uttar Pradesh on random basis. The copy of the M.O.U. was produced but has been ignored by the trial Court rather it relied on the report of CDFD, Hyderabad to connect the accused with the crime. The finding was recorded by misreading of the statement of PW-23 Rajiv Paliwal, Scientist of Forensic Science Laboratory, Lucknow. He deposed that high techniques for Y-STR like power plex R.T.P.C., contifiler were not available at Forensic Science Laboratory, Lucknow, therefore, had gone to CDFD, Hyderabad. DNA test was conducted at CDFD, Hyderabad in the presence of PW-23 Rajiv Paliwal. The statement of PW-23 Rajiv Paliwal has been relied by the trial Court in ignorance of the letter dated 24.12.2012 obtained by the appellant under Right to Information Act, 2005. CDFD, Hyderabad informed that no case was registered at the laboratory out of the First Information Report No. 1029 of 2010 registered at Police Station Kalyanpur, Kanpur Nagar.

16. In view of the above, a fraudulent report was prepared and produced by the prosecution and relied by the trial Court to show that semen found on the underwear and skirt of the deceased was matched to DNA blood group of the accused Piyush Kumar Verma whereas no semen was found on the skirt.

17. The trial Court for it even ignored that as per the order, the blood sample of Piyush Kumar Verma was collected on 22.12.2010 while the Scientist PW-23 Rajiv Paliwal had gone to CDFD, Hyderabad before it, i.e., on 16.12.2010, therefore, there was no possibility of carrying blood sample of accused-appellant Piyush Kumar Verma. His blood sample was not taken on 09.11.2010. The trial Court yet recorded its finding that blood sample of 13 donors was taken by CW-3 Dr. Satish Chandra Verma in the Court of C.M.M., Kanpur Nagar on 09.11.2010. The trial Court has ignored the statement of the accused-appellant under Section 313 Code of Criminal Procedure in regard to the date of collection of blood sample only on the ground that no evidence has been produced in defence to prove that blood sample of Piyush Kumar Verma was taken on 22.12.2010 and thereby, relied on the statement of CW-3 Dr. Satish Chandra Verma.

18. Learned counsel further submitted that the alleged blood samples of the donors including accused Piyush Kumar Verma, Sudhir Kumar Verma @ Mukesh Verma and Chandra Pal Verma were said to be containing the case crime number as per the statement of PW-19 Dr. Ashok Kumar Jatav and PW-26 Ravi Chaturvedi. The other witness Dr. Archana Tripathi (PW-22), however, deposed that the sample received by Forensic Science Laboratory, Lucknow was not bearing the case crime number. The fact aforesaid was ignored by the trial Court though sufficient to prove that samples received by Forensic Science Laboratory were different than the sample collected by CW-3 Dr. Satish Chandra Verma. Learned trial Court should not have relied on the test reports for that reason also.

19. Learned trial Court even ignored the statement of PW-25 Dr. Alka Shukla

who examined anal and vaginal smear of the deceased Divya and did not find any semen in it. The reference of Exhibits A-14 and A-15 was given for it. The aforesaid was sufficient to show that the offence under Section 377 Indian Penal Code was not committed by the accused Piyush Kumar Verma otherwise the presence of semen would have been found in the anal or vaginal smear of the deceased.

20. It is further submitted that to falsely implicate the appellant Piyush Kumar Verma, the prosecution introduced unknown mobile number. The mobile number 9451771705 was belonging to one Ravi Kumar. The prosecution could not bring any evidence about use of said mobile number by the accused Piyush Kumar Verma yet the trial Court recorded finding regarding use of said mobile number by the accused Piyush Kumar Verma and based on CDR, connected the accused Piyush Kumar Verma with the crime. The presence of the accused Piyush Kumar Verma was found nearby school at the time of incident as CDR was showing many phone calls from the aforesaid phone number to his father Chandra Pal Verma and co-accused Sudhir Kumar Verma @ Mukesh Verma and Santosh Kumar Singh and Principal of the school. The trial Court drawn inference to connect accused Piyush Kumar Verma with the crime based on the CDR of the phone number 9451771705 as Ravi Kumar was not found at the address disclosed for obtaining SIM Card. Even his whereabouts were not found despite sending summons and even by the Process Server. It was presuming that an unknown person would not frequently talk to the father and brother of the accused Piyush Kumar Verma apart from the staff at the time of incident. The trial Court could not have recorded finding based on presumption rather it should have been based on the evidence proving the case beyond doubt.

21. Learned counsel further submitted that the trial Court misread the DNA report (Exhibit A-13) as the last line of the said report discloses that no firm opinion can be given regarding DNA. The trial Court yet recorded finding that semen/sperm on the skirt and underwear of the deceased was matching to the DNA of Piyush Kumar Verma. It is despite the fact that PW-22 Dr. Archana Tripathi did not specifically stated that sperm/semen was matching to DNA of the accused Piyush Kumar Verma. In view of aforesaid, this Court should interfere in the finding recorded by the trial Court as it is based on surmises and conjectures rather a perverse finding has been recorded by the trial Court. The accused should not have been convicted in absence of the evidence to prove the case beyond doubt. The trial Court was in fact annoyed with the accused-appellant. It is reflected from the fact that a stamped application of the accused Piyush Kumar Verma was torn off and thereby, the trial Court passed the judgment with bias.

22. It is further submitted that so far as conviction and sentence of other accused Sudhir Kumar Verma @ Mukesh Verma and Santosh Kumar Singh are concerned, again no evidence exists against them for the offence under Section 304A, 202 Indian Penal Code. They have been convicted despite the fact that even no charge for the offence under Section 304A Indian Penal Code was framed against them. The prayer is accordingly to allow both the appeals.

23. The appeal is seriously contested by learned Additional Government Advocate. Learned Additional Government

Advocate has made reference of the evidence led by the prosecution to prove its case beyond doubt and contested all the arguments raised by learned counsel for the appellants. To save repetition, all those arguments would be considered while discussing the arguments of learned counsel for the appellants.

Discussion and finding of the Court :

24. It is a case of circumstantial evidence. To find out whether the chain of circumstances has been brought by the prosecution to connect the accused with the crime, we would discuss the evidence led by both the parties by framing the subjects to find out whether prosecution could prove its case beyond doubt by making out a chain of circumstances.

Place of occurrence :

25. The first circumstance relevant for finding chain is the place of occurrence. The first information report and the evidence available on record shows that on 27.09.2010 at around 07:30 A.M., the deceased Divya was dropped by her mother at the school. She was pursuing her studies in Class VIth. The prosecution witnesses have proved availability of deceased Divya in the school on 27.09.2010 and she was sent back to her residence with school female attendant Parveen and Maya. They dropped the deceased at her residence at around 01:00 P.M. on the date of occurrence, i.e., 27.09.2010. The fact aforesaid has been proved by PW-3 Smt. Sonu Bhadauria apart from PW-8 Parveen, PW-9 Maya, PW-10 Rama Dave, PW-11 Sunita Mishra, PW-12 Anamika Kushwaha, PW-14 Sakshi Vishwakarma and PW-16 Ekta Yadav. PW-8 to PW-14 and PW-16 are the staff members or the student of the school belonging to the accused family. PW-4 Vimla Devi is the landlady of the house in which Sonu Bhadauria and her family were residing. She stated that on the day of occurrence, the deceased was taken to the school by her mother and was dropped back by the female attendant of the school at around 01:00 P.M. She was not knowing the names of those female attendant. The deceased was unwell on the day of occurrence yet mother dropped her at the school in the morning.

26. PW-8 Parveen stated that she was Female Attendant in the school which was opening at around 07:45 A.M. On the day of occurrence, she got information from the ma'am that one child is having vomit sensation. She later on was having toilet/motion. She went upstairs where deceased was found sitting in an uncomfortable position. She lifted the deceased and found that clotted blood is coming out from her vagina. It was giving foul smell. The blood spread on the skirt and school bag. She took the girl to bathroom and cleaned her with the water. The blood was still coming. She was asked to inform the deceased's mother. She visited her house but girl's mother Sonu Bhadauria was not found available. When the blood was not stopped, a cloth was inserted in vagina by Rama Ma'am. The child was then taken to her residence by her as well as PW-9 Maya. The landlady was available and on her instruction, the child was left on a cot.

27. The statement of PW-8 Parveen has been corroborated by PW-9 Maya regarding availability of the deceased Divya in school on the day of occurrence, i.e., 27.09.2010. She further stated about

bleeding and dropping of the deceased at her residence accompanying another female attendant PW-8 Parveen. She has described the condition of the deceased. It is stated that she alongwith PW-8 Parveen had placed the socks, shoe and clothes of the child in the school bag and dropped her at her residence in an auto.

28. PW-10 Rama Dave has also stated about presence of the deceased in the school on 27.09.2010. She came around 07:30 A.M. The condition of the deceased was also described. She further stated that after taking the classes, saw deceased sitting in the class in an uncomfortable condition. She asked about her health and thereupon went on 4th floor to take lunch. When she came back after lunch, seen deceased lying in the classroom where Sunita Mishra, Anamika and Mohita apart from the female attendant Maya and Parveen were present. On inquiry, it came out that the girl at the age of 11 years suffered menses, therefore, need to be given first aid. She immediately went to her house to bring the cloth and the pad. The pad was placed on the vagina from where blood clots having foul smell were coming out. Looking to the condition, the deceased was sent to her residence alongwith female attendant PW-8 Parveen and PW-9 Maya. The aforesaid witnesses have supported the statement of other witnesses for presence of the deceased in the school on 27.09.2010 till she was dropped at her residence at around 01:00 P.M. The fact aforesaid has been corroborated by PW-11 Sunita Mishra, PW-12 Anamika Kushwaha, PW-13 Mohita Srivastava, PW-14 Sakshi Vishwakarma and PW-16 Ekta Yadav. The statement of those witnesses could prove the presence of the deceased in the school on the day of occurrence till 01:00 P.M. All the witnesses other than PW-4 Vimla Devi are none-else but the staff members, the employee and the student of Bharti Gyan Sthali School run by Chandra Pal Verma, i.e., accused Piyush Kumar Verma and Sudhir Kumar Verma @ Mukesh Verma's father. Thus, presence of the deceased in the school on the day of occurrence was proved by the prosecution. The fact aforesaid has not been contested by the appellant during the course of the argument.

Whether occurrence took place in the school :

29. The another chain relevant would be as to whether any occurrence took place in the school on 27.09.2010. For the aforesaid, reference of the statements of PW-8 to PW-14 are relevant. Those witnesses have described condition of the deceased but did not state about commission of the offence of Section 377 Indian Penal Code. The medical condition of the girl was shown to be poor and said to have suffered first menses, thus, excessive bleeding. To prove offence under Section 377 Indian penal Code, the prosecution produced PW-15 Govind Singh Yadav though he was declared hostile. The post mortem conducted by the team of four doctors. They have shown five injuries to the deceased, out of which, injury no. 4 was old. Her rectum was found ruptured and perforated size 2 x 1.5 cm. The post mortem was conducted on 28.09.2010. No injury was found on the vagina and hymen of deceased was found intact. No blood was reported to be out of vagina rather it was out of rectum. The post mortem was conducted of which a video was prepared followed by a report at Exhibit A-11. The post mortem report was prepared by Dr. Sandeep Srivastava in his writing. PW-30 Anil Kumar Singh had initially conducted

the investigation and collected blood from the floor of the school and even prepared recovery memo Exhibit A-5 in the presence of Anamika Kushwaha and Mohita Srivastava.

30. Whether the occurrence took place in the school is to be seen in reference of the prosecution witness PW-9 Maya. She has stated that after entry of the students in the school, the doors are closed and nobody can enter the school thereupon. The fact aforesaid is relevant because defence tried to implicate one Munna to cause occurrence. Said Munna is shown to be residing near the residence of the deceased said to have caused occurrence. The Court did not find any involvement of Munna in the occurrence because till the deceased was taken to her home by PW-8 Parveen and PW-9 Maya at around 01:00 P.M., she was in the school and no outsider was permitted to enter the school without the permission. Thus, the effort of the defence to implicate Munna could not get result in the light of the statements of the witnesses produced by the prosecution. The evidence on record shows that the deceased was immediately, i.e., at 01:30 P.M. taken to the hospital by PW-15 Govind Singh Yadav where she was declared dead. The death said to have occurred one hour before.

31. Learned trial Court analysed the case to find out the possibility of causing of injury on the rectum after the deceased was brought to her residence at around 01:00 P.M. The evidence on record shows that PW-15 Govind Singh Yadav took the girl immediately to the hospital after she was dropped by female attendant of the school at her residence. It was on the request of the ladies residing in the vicinity and in absence of her mother. The deceased was taken to the emergency wing of the hospital where doctor declared her to be dead. The said witness was declared hostile but his statement can be relied to the extent it is corroborated by other evidence. Learned trial Court has recorded its finding that after death, the body becomes stiff and even the parts shrink thus, no possibility remain to cause injury on the rectum thereupon. The fact aforesaid is otherwise relevant for the reason that even the defence could not bring evidence to show that injury on the rectum was caused subsequently so as to ignore post mortem report showing it to be ante mortem injury. In view of the aforesaid, injury on the rectum came in the school thereby occurrence took place in the school.

32. The case of the defence is that deceased suffered excess bleeding out of vagina due to menses or she was pregnant. The pregnancy has been eliminated by the trial Court as hymen of the deceased was found intact and otherwise there was no medical evidence to prove pregnancy rather her ovary was found empty. So far as suffering from the menses and excessive bleeding out of vagina is concerned, the opinion aforesaid has not been reflected in the post mortem report. It is otherwise a fact that if the girl suffered from excess bleeding due to menses, the natural action of the school authority should have been to immediate take her to the hospital. The evidence rather shows abnormal conduct for the reason that even when deceased was dropped at her residence, no information about it was given rather she was left on a cot without any information about excessive bleeding.

Whether accused-appellant Piyush Kumar Verma was present at the place of occurrence :

33. To have chain of circumstances, another issue relevant is as to whether accused-appellant Piyush Kumar Verma was present in the school when the occurrence took place. This has also been proved by the prosecution by their evidence. The accused-appellant has alleged it to be case of false implication of Piyush Kumar Verma due to political and social rivalries. In the defence and the statement under Section 313 Code of Criminal Procedure, it has been stated by the accused Piyush Kumar Verma that he was not looking after the school in which occurrence took place. It was looked after by his ailing father Chandra Pal Verma. He was managing another school at the distance of 3-4 Kms. from the place of occurrence and was available in that school at the time of occurrence.

34. The prosecution produced CDR of Mobile No. 9451771705 and 9336126404 apart from Mobile Nos. 9839540378, 9453041928, 9793969328 and 9794776870. As per the CDR, location of Sudhir Kumar Verma @ Mukesh Verma was found in Unnao between 11:00 A.M. till evening. The statement of Deepak Kumar Sinha (PW-27), Aditya (PW-28) and Rajiv Singh Sengar (PW-29) has proved the CDRs produced by the prosecution.

35. PW-27 Deepak Kumar Sinha has stated that CDR of Mobile No. 9451771705 was prepared on 23.02.2011 by Vinod Kumar Arora, retired Divisional Engineer (Exhibit A-31). With regard to another mobile no. 9453041928 belonging to Laxmi Niwas Mishra, the husband of Smt. Sunita Mishra was also prepared by Vinod Kumar Arora on 23.02.2011. The CDR of aforesaid mobile was exhibited. There were 29 calls from Mobile No. 9451771705.

36. PW-28 Aditya made statement regarding Mobile No. 9336126404 belonging to Sudhir Kumar S/o Chandra Pal Verma. The CDR was prepared by Madhu Balbhu and the said CDR was proved in evidence. Mobile No. 9389540378 was belonging to Shailendra Mishra whose CDR was generated from Mumbai Headquarter. PW-29 Rajeev Singh Sengar proved CDR of Mobile No. 9794776870 and 9793969328. The prosecution came with the case that Mobile No. 9451771705 was used by the accused Piyush Kumar Verma. The said mobile was used to call Chandra Pal Verma, co-accused Sudhir Kumar Verma @ Mukesh Verma, Santosh Kumar Singh and Sunita Mishra on the day of occurrence and at the relevant time. The conversation from the mobile number used by Piyush Kumar Verma was frequently and is proved by the CDRs.

37. The argument of the defence is that mobile no. 9451771705 was not belonging to the accused Piyush Kumar Verma rather Sim Card was issued in the name of one Ravi Kumar. According to defence, the involvement of aforesaid mobile number was only to make false implication of the accused Piyush Kumar Verma.

38. The trial Court did not accept the aforesaid for the following reasons. As per the statement of CW-1 Punam Rajput and CW-2 Ajai Kumar, Ravi Kumar was not residing on the address given for obtaining Sim Card. CW-1 Punam Rajput is Parshad of Ward No. 44. She stated that Ravi Kumar was not residing in the area or nearby. She further stated that a Constable came to trace out Ravi Kumar but he was not found on the address and thereby, a report was submitted. CW-2 Ajai Kumar

has stated that he went to execute the summon issued by the Court on Ravi Kumar. He visited the place given in the ID proof and other document. He had even carried photograph of Ravi Kumar. He was not found at the address and nearby. Nobody was knowing him even after seen the photograph. None could recognise Ravi Kumar rather stated that the person in the photograph never resided in the area. The prosecution could prove that though Sim Card was issued in the name of Ravi Kumar but the address of document and other documents could not be verified as Ravi Kumar was not found on the address rather never resided. Thereby, Piyush Kumar Verma had obtained the Sim Card in the name of Ravi Kumar and was using it. The inference was drawn though was not required as the statement made by the accused under Section 313 Code of Criminal Procedure and more particularly Chandra Pal Verma and Sudhir Kumar Verma @ Mukesh Verma could not give reason of phone calls and regular conversation with unknown number that too on the day of occurrence. The CDR is showing frequent conversation between four mobile numbers referred to above and that too at the time of occurrence.

39. The trial Court found that mobile number was obtained in the name of Ravi Kumar and used by the accused Piyush Kumar Verma. The CDR of mobile no. 9451771705 shows frequent conversation with other accused Chandra Pal Verma and Sudhir Kumar Verma @ Mukesh Verma apart from Sunita Mishra at the time of occurrence and location of the mobile no. 9451771705 was found near the school in which occurrence took place and thereby, the prosecution could prove the presence of the accused Piyush Kumar Verma at the time of occurrence.

40. It is further relevant to note that as per the statement of PW-9 Maya, no outsider could enter in the school after closing the gates after entry of the students in the morning. Thereby, occurrence in the school could have been by a person having access in the school. It was a girls school and the statement of witnesses produced by the prosecution could show presence of mainly female staff members while offence under Section 377 Indian penal Code took place.

41. The argument of learned counsel for the appellants cannot be accepted that prosecution could not connect Piyush Kumar Verma with mobile no. 9451771705. The argument of learned counsel that witnesses produced by the prosecution did not state about conversation ignoring that the CDR produced by the prosecution shows conversation with the accused each other and Sunita Mishra on their mobile numbers. There were 29 calls made during the relevant time. The statements of PW-27 Deepak Kumar Sinha, PW-28 Aditya and PW-29 Rajiv Singh Sengar have proved CDRs produced in evidence. Those CDRs show frequent conversation between those mobiles. The fact regarding frequent conversation on those mobile was not required to be stated time and again as otherwise stated by PW-27 Deepak Kumar Sinha. The statement was corroborated by the CDRs proved in the evidence. The argument that there was no conversation between those mobile numbers is an argument in ignorance of the CDR available on record showing frequent conversation. In view of the above, we find that another relevant circumstances to connect the accused could be proved by the prosecution.

Whether prosecution could bring other evidence to prove the case :

42. The learned counsel for the appellant vehemently argued that the prosecution could not bring any evidence to show involvement of the accused Piyush Kumar Verma in the occurrence. We have recorded our finding that presence of the accused Piyush Kumar Verma at the place of occurrence could be proved by the prosecution. The prosecution produced other evidence to connect accused Piyush Kumar Verma with the crime. The material evidence to prove prosecution case is FSL report also which has been contested by learned counsel for the appellants. The contest has been made not only alleging preparation of fraudulent FSL report by PW-23 Dr. Rajiv Paliwal but the recovery memo (Exhibit A-5). We would first refer to recovery memo (Exhibit A-5) showing recovery of underwear of the deceased.

43. Learned counsel for the appellant has alleged addition of two lines at the end of the recovery memo to show recovery of the underwear. The recovery memo shows recovery of underwear of the deceased and the relevance of the underwear is due to DNA test report. The semen found on the underwear matched to the DNA of the accused and thereby it became relevant connecting evidence. PW-12 Anamika Kushwaha and PW-13 Mohita Srivastava have admitted signature on the recovery memo (Exhibit A-5) but stated that last two lines were not existing at the time of signing the recovery memo. The trial Court has dealt with the aforesaid facts in reference of the statement of other witnesses who stated that in the school bag, shirt, skirt, tie, belt and shoes of the deceased were kept after wrapping it in "Yellow Dhoti". The underwear was not found in the school bag of the deceased. Therefore, the recovery of the underwear of the deceased was found proved by the trial Court.

44. The dispute about recovery of the underwear is mainly for the reason that DNA report was showing human semen matching to the DNA group of the accused. It is a fact that no allegation have been imputed against the officer who prepared the recovery memo and proved it. The argument has not been raised against the officer in particular to show recovery of underwear and addition of the lines by fraudulent means. It could not have been even for the reason that after recovery of articles, it was sent for FSL report and there the underwear of the deceased has been shown to be one of the article sent for the FSL report. If the underwear would not have been recovered from the place of occurrence and was not available in the school bag then how it was sent for FSL report, could not be explained by learned counsel for the appellants.

45. The further fact relevant is the presence of human semen on the underwear of the deceased matching to the DNA of the accused. The appellant has not come with the case that semen of the accused was taken forcibly and was put on the underwear of the deceased to obtain FSL report. Thus, taking note of all the aspects, recovery of the underwear cannot be doubted only for the reason that FSL report is adverse to the appellant.

46. The other aspect relevant to the case and vehemently argued by learned counsel for the appellant is about FSL/DNA report. The argument was raised in reference of the statement of PW-23 Rajiv Paliwal and the documents produced

in defence. It is for obtaining report from CDFD, Hyderabad without an M.O.U. between FSL, Lucknow and CDFD, Hyderabad. PW-23 Rajiv Paliwal, Scientist of FSL, Lucknow stated that techniques for Y-STR like power plex R.T.P.C., contifiler were not available at FSL, Lucknow, therefore, he had gone to CDFD, Hyderabad to conduct the test and to get the report. The aforesaid statement has been questioned by learned counsel for the appellant in reference to M.O.U. as well as document obtained from CDFD, Hyderabad under Right to Information Act, 2005. It is stated that there exist no M.O.U. between CDFD, Hyderabad and FSL, Lucknow to conduct the test in the manner it has been done in the present case. It is further stated that CDFD, Hyderabad was not having record for the test.

47. The issue aforesaid has been considered by the trial Court in detail. It was found that the M.O.U. was existing between FSL, Lucknow and CDFD, Hyderabad for conducting the test. It may be for the training purposes but it does not preclude the Scientist of FSL, Lucknow to get a report from CDFD, Hyderabad when required techniques were available at FSL, Lucknow. PW-23 Rajiv Paliwal was declared hostile but his statement for conducting the test and obtaining report from CDFD, Hyderabad corroborated by the test report thus can be read. The allegation of political and social rivalry has been made by learned counsel for the appellant but no evidence was placed to prove those allegations. The statement of PW-23 Rajiv Paliwal shows that he himself went to CDFD, Hyderabad to conduct the test and to prepare the report. In view of the aforesaid, if the case crime number was not recorded in the register, the report of CDFD, Hyderabad cannot be discarded. The information was sought by the appellant under Right to Information Act, 2005 is not of the nature which can discard the test report of CDFD, Hyderabad. The test report otherwise is relevant and crucial for the reason that DNA of the accused could match to the semen found on the underwear of the deceased to connect Piyush Kumar Verma with the crime.

48. At this stage, learned counsel for the appellant submitted that even the DNA report does not conclude with the finding that semen on the underwear was matching to the DNA of Piyush Kumar Verma rather it was shown to be human semen matching to the DNA of accused who are more than one. The Court erroneously recorded finding against accused Piyush Kumar Verma going contrary to the evidence.

49. We have considered aforesaid aspect also. The statements of PW-22 Dr. Archana Tripathi and PW-23 Dr. Rajeev Paliwal are relevant for it. PW-22 Dr. Archana Tripathi has proved Exhibit A-13 (the test report). PW-23 Dr. Rajeev Paliwal was declared hostile witness but he has also admitted the report and the fact that the test was conducted at CDFD, Hyderabad. The report was considered by the trial Court having evidence against the accused. It was then taken against appellant Piyush Kumar Verma present in the school at the time of occurrence.

50. The argument has been raised in reference to the statement of PW-25 Dr. Alka Shukla who examined anal and vaginal smear of the deceased Divya. She did not find semen in it. A reference of Exhibits A-14 and A-15 was given. The argument has been raised that when semen was not found in the anal and vaginal smear, an offence under Section 377 Indian

Penal Code cannot be said to have been committed. The argument aforesaid has been considered by the trial Court. It has discussed not only in reference to the evidence but the circumstance which may not show presence of semen in the anal and vaginal smear in the given case. In the present matter, the rectum of the deceased was found lacerated and perforated size 2 x 1.5 cm upto sigmoid colon. Learned trial Court found that offence under Section 377 Indian Penal Code has been committed by a boy aged 24-25 years. The erection can be kept or take place outside. It is otherwise a case where semen was found on the underwear of the deceased matching to the DNA of the accused. Thus, the argument made in reference to statement of PW-25 Dr. Alka Shukla cannot be accepted.

51. The other aspect is the date of taking of blood sample of accused Piyush Kumar Verma. It is said to be on 22.12.2010 while as per the statement of CW-3 Dr. Satish Chandra Verma, the blood samples were taken on 09.11.2010 on the direction of C.M.M., Kanpur Nagar. CW-3 has stated about collection of 13 blood samples of different donors on 09.11.2010. He was accompanied by Dr. V.P. Chaturvedi. The samples were properly sealed and sent to FSL, Lucknow in the manner required. He was not cross-examined by the accused in regard to the date of collection of samples. Even no question was raised in reference to alleged date of taking sample on 22.12.2010. The date aforesaid was introduced by the accused Piyush Kumar Verma in the statement under Section 313 Code of Criminal Procedure for the first time. If the sample would have been taken on 22.12.2010, then there was no reason for the appellant Piyush Kumar Verma not to cross-examine CW-3 Dr. Satish Chandra Verma on that issue. Exhibit A-13 on record shows the date of the sample. It is not 22.12.2010 rather of 09.11.2010. The appellant has tried to cook-up new story subsequently without any evidence to prove collection of sample of Piyush Kumar Verma on 22.12.2010. Thus, the date aforesaid for collection of sample was not accepted. The witness was not even cross-examined regarding different dates for collection of blood samples of 13 persons pursuant to the order of the Court. The reference of the date of sample is otherwise given in Exhibit A-13 and is of 09.11.2010. Thus, the argument of learned counsel for the appellant in reference to the date of collection of blood sample cannot be accepted.

52. It is then urged that as per the statement of PW-23 Rajiv Paliwal, the samples were packed and the case crime number was also indicated. The statement aforesaid has not been corroborated by PW-22 Dr. Archana Tripathi who stated that the case crime number on the sample was not mentioned. It is alleged by the appellant that a different sample was used for lab test.

53. Learned trial Court has considered the aforesaid argument also and found that the witness may not exactly state about a fact pertaining to an event took place 5 to 8 years back. PW-22 Dr. Archana Tripathi has stated about receipt of the blood samples and E.D.T. vial was containing names of the donors. It was received in a sealed bundle with required details. She was not cross-examined in reference to case crime number despite the fact that she had proved the document regarding receipt of 13 samples with names and the test report of the accused. The document Exhibit A-13 proved receipt of samples

collected on 09.11.2010 of 13 donors and case crime number. Looking to the aforesaid, we do not find any reason to cause interference in the findings of the trial Court. The witness PW-22 Dr. Archana Tripathi was not even asked about alleged fraudulent preparation of report of blood sample.

54. Learned counsel for the appellant submitted that even Exhibit A-13 does not record a conclusive finding at the end. The argument aforesaid has been raised ignoring the report. Only one part of the report has been referred while earlier part give conclusive evidence.

55. In the light of the aforesaid, while we are unable to accept any of the argument raised by learned counsel for the appellant, find that prosecution could bring evidence to connect the accused Piyush Kumar Verma with crime beyond doubt for commission of offence under Section 377 Indian Penal Code. The finding in regard to the commission of offence under Section 377 Indian Penal Code has been recorded at the first instance. The learned trial Court further found commission of offence under Section 302 Indian Penal Code by the appellant and for that, reference of Section 299, 300 Indian Penal Code apart from 302 India Penal Code has been given with interpretation in reference of the judgment of the Supreme Court.

56. Learned counsel for the appellant submitted that there was no intention or motive on the part of the appellant Piyush Kumar Verma to commit offence under Section 302 Indian Penal Code, however, while raising the said argument, the finding recorded by the trial Court was not questioned other than to the interpretation to the definition of "murder" punishable under Section 302 Indian Penal Code. Finding of the trial Court in regard to the commission of offence under Section 302 Indian Penal Code by the accused Piyush Kumar Verma is quoted hereunder :

''106– धारा 302 भा0दं0सं0 के अन्तर्गत हत्या को धारा 300 भा0दं0सं0 में परिभाषित किया गया है। धारा 300 भा0दं0सं0 के अनुसार–

एतस्मिन् पश्चात अपवादित दशाओं को छोड़कर आपराधिक मानव वध हत्या है।

– यदि वह कार्य, जिसके द्वारा मृत्यु कारित की गयी हो, मृत्यु कारित करने के आशय से किया गया हो, अथवा

2– यदि वह ऐसी शारीरिक क्षति कारित करने के आशय से किया गया हो जिससे अपराधी जानता हो कि उस व्यक्ति की मृत्यु कारित करना सम्भाव्य है जिसको वह अपहानि कारित की गयी है, अथवा

3– यदि वह किसी व्यक्ति की शारीरिक क्षति कारित करने के आशय से किया गया हो और वह शारीरिक क्षति, जिसके कारित करने का आशय, प्रकृति के मामूली अनुक्रम में मृत्यु कारित करने के लिए पर्याप्त हो, अथवा

4– यदि कार्य करने वाला व्यक्ति यह जानता हो कि वह कार्य इतना आसन्नसंकट है कि पूरी अधिसंभाव्यता है कि वह मृत्यु कारित कर ही देगा या ऐसी शारीरिक क्षति कारित कर ही देगा जिससे मृत्यु कारित होना सम्भाव्य है और वह मृत्यु कारित करने या पूर्वोक्त रूप की क्षति कारित करने की जोखिम उठाने के लिए किसी प्रतिहेतु के बिना ऐसा कार्य करे।

इस प्रकार से धारा 302 भा0दं0सं0 में क्रम संख्या–4 पर यह उल्लिखित है कि यदि कार्य करने वाला व्यक्ति यह जानता हो कि वह कार्य इतना आसन्नसंकट है कि पूरी अधिसंभाव्यता है कि वह मृत्यु कारित कर ही देगा या ऐसी शारीरिक क्षति कारित कर ही देगा जिससे मृत्यु कारित होना सम्भाव्य है और वह मृत्यु कारित करने या पूर्वोक्त रूप की क्षति कारित करने की जोखिम उठाने के लिए किसी प्रतिहेतु के बिना ऐसा कार्य करता है तो हत्या की क्षेणी में आता है।

107– यहॉ यह उल्लेखनीय है कि 11 वर्षीय अबोध बालिका के साथ विद्यालय जैसे पवित्र संस्था में जहॉ छात्र शिक्षा ग्रहण करने जाते है वहॉ अभियुक्त के द्वारा एक अबोध बालिका के साथ अप्राकृतिक मैथुन करके उसके इतनी प्रबल चोट पहुॅचायी है जिसके परिणामस्वरूप हुए अत्यधिक रक्त स्त्राव के कारण उसकी मृत्यु हुई है। घटना के समय अभियुक्त पीयूष वर्मा की उम्र लगभग 24–25 वर्ष की रही होगी और उस उम्र में कामुकता के मदांग्ध होकर अभियुक्त के द्वारा यह जानते हुए कि उसके द्वारा जो अबोध बालिका के साथ

कार्य किया जा रहा है वह कार्य इतना आसन्नसंकट है कि उसे इतनी गंभीर शारीरिक क्षति हो सकती है जिससे उसकी मृत्यु कारित होना भी सम्भव है और मृत्यु कारित करने का जोखिम उठाने के लिए उसके द्वारा कुकृत्य किया गया है वह निश्चित तौर पर ऐसा आपराधिक मानव वध है जो घटना के परिणाम स्वरूप हुए अत्यधिक रक्त स्त्राव के कारण मृतका की मृत्यु में परिवर्तित हुआ और इस प्रकार से अभियुक्त पीयूष वर्मा धारा 302 भा0दं0सं0 के अन्तर्गत भी दोषी पाया जाता है।''

57. We find that learned trial Court has made a reference of Section 300 Indian Penal Code to find out whether a case under Section 302 Indian Penal Code is made out. The offence under Section 377 Indian Penal Code was committed by the accused Piyush Kumar Verma on a girl at the age of 11 years when she was not fully grown. The injuries to the deceased have been recorded in the post mortem report. The cause of death was due to excessive bleeding and shock. The learned trial Court has discussed about commission of offence by the accused Piyush Kumar Verma. It has not been questioned in argument other than the interpretation of the definition of "murder". The evidence on record has proved commission of offence of Section 302 Indian Penal Code by accused Piyush Kumar Verma. We do not find any illegality in the finding recorded by the trial Court. Thereby, we maintain the judgment of the trial Court, vis-a-vis, the appellant-accused Piyush Kumar Verma as none of the arguments of learned counsel for the accused-appellant Piyush Kumar Verma could be accepted by this Court.

The appeal of accused-appellant Piyush Kumar Verma is, accordingly, dismissed.

58. The appellants Sudhir Kumar Verma @ Mukesh Verma and Santosh Kumar Singh have been convicted and sentenced for offence under Section 304A and 202 Indian Penal Code. They were, however, acquitted of the offence under Section 201 Indian Penal Code as the prosecution failed to lead evidence to prove that those two appellants suppressed or disappeared the evidence. They were even acquitted from the offence under Section 304 Indian Penal Code. The appellants, however, convicted for the offence under Section 202 and 304A Indian Penal Code.

59. The conviction for offence under Section 202 Indian Penal Code has been made in reference to the statement of PW-28 Aditya and Exhibit A-35, i.e., CDR report of Mobile Nos. 9336126404 and 9389540378. It is true that both the mobiles were used for frequent conversation with main accused Piyush Kumar Verma. The conversation was made during the relevant time on the day of occurrence but merely for that reason, it cannot be said that offence under Section 202 Indian Penal Code is proved.

60. The offence under Section 202 Indian Penal Code found proved mainly in reference to inaction of accused for sending the victim/deceased to the hospital. The trial Court ignored that no evidence was produced that Sudhir Kumar Verma @ Mukesh Verma was administrating the educational institution where occurrence took place and was under legal duty. The Principal of the school was otherwise Sunita Mishra and has not been made an accused. The conviction for the offence under Section 202 Indian Penal Code has been made alleging negligence of the accused ignoring that offence under Section 202 Indian Penal Code would be made out when the accused is under a legal obligation to convey the information about commission of offence but failed to do so. The finding of the trial Court does not

show even an allegation against the accused-appellants Sudhir Kumar Verma @ Mukesh Verma and Santosh Kumar Singh about their legal obligation to inform about the crime and their failure to do so. The learned trial Court has recorded finding about negligence and not for their legal duty. The finding of the trial Court in regard to the offence under Section 202 Indian Penal Code cannot be accepted as even the ingredients of the aforesaid provision could not be proved by the prosecution by leading evidence. Section 202 Indian Penal Code is quoted hereunder for ready reference :

*"**202. Intentional omission to give information of offence by person bound to inform.**--Whoever, knowing or having reason to believe that an offence has been committed, intentionally omits to give any information respecting that offence which he is legally bound to give, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both."*

61. The trial Court has not recorded finding about legal obligation of the accused to make out a case for offence under Section 202 Indian Penal Code. The negligence of the accused would not make out a case under Section 202 Indian Penal Code unless their legal obligation is proved.

62. The conviction for the offence under Section 304A Indian Penal Code is another issue. The impugned judgment shows that a charge for the offence under Section 304A Indian Penal Code was not framed rather it was for Section 304 Indian Penal Code. The finding has been, however, recorded that even if the charges were not framed then as per the judgment of Apex Court in the case of **Dalvir Singh Versus State of Uttar Pradesh** reported in **(2004) 5 SCC 334**, the conviction for the offence having lesser punishment can be made.

63. So far as the accused Sudhir Kumar Verma @ Mukesh Verma is concerned, the evidence on record shows that he was not available at the place of occurrence rather was at Unnao. The conviction for the offence under Section 304A Indian Penal Code can be made when act of negligence or ignorance in performance of work resulting in death not amounting to culpable homicide is proved. We do not find that prosecution could produce any evidence of that nature to make out an offence under Section 304A Indian Penal Code against the appellant Sudhir Kumar Verma @ Mukesh Verma and Santosh Kumar Singh. Section 304A Indian Penal Code is quoted hereunder for ready reference :

*"**304A. Causing death by negligence**.--Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."*

64. The evidence produced by the prosecution does not prove offence under Section 304A Indian Penal Code by the appellants Sudhir Kumar Verma @ Mukesh Verma or Santosh Kumar Singh. Accordingly, their conviction for the offence under Section 304A and 202 Indian Penal Code cannot sustain rather they are acquitted for the offence and, accordingly, their conviction and sentence is interfered and to that extent, the impugned judgment

of the trial Court is set aside. Their bail bonds are discharged as both of them are on bail.

65. **The appeal of Sudhir Kumar Verma @ Mukesh Verma and Santosh Kumar Singh is allowed.**

(2021)06ILR A105
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.02.2021

BEFORE

THE HON'BLE MAHESH CHANDRA TRIPATHI, J.
THE HON'BLE SANJAY KUMAR PACHORI, J.

First Appeal (D) No. 32 of 2021

Priyanka Chauhan ...Appellant
Versus
Principal Judge, Family Court, G.B. Nagar & Anr. ...Respondents

Counsel for the Appellant:
Sri Vinay Kumar Khare, Sri Sharvesh Kumar Pandey

Counsel for the Respondents:
Sri Vinod Singh

A. Civil Law - Hindu Marriage Act, 1955 – Section 13-B(2) – Family Courts Act, 1984 – Section 19 – Matrimonial dispute – Irretrievable break down – Divorce by mutual consent – Cooling period of 6 months – Mandatory or Directory – Waiver, when can be granted – Both parties are literate and decided with full conscious mind that they have to be separated – No force, fraud or undue influence found – Wife remained in her matrimonial house only for four days and they are living separately for more than one year – No consummation of marriage – No chance of reconciliation – Held, Cooling off period of six months is directory with certain conditions – It can be waived by the court, where, proceedings are pending, in exceptional situation – When marriage has irretrievably broken down, such marital relationship can be dissolved which is already dead, with a view to do complete justice between the parties – Application to waive the cooling period of six months, allowed. (Para 19, 20, 31, 32 and 33)

First Appeal allowed. (E-1)

Cases relied on :-

1. Jagraj Singh Vs Birpal Kaur; (2007) 2 SCC 564

2. Amardeep Singh Vs Harveen Kaur; (2017) 8 SCC 746

3. R. Srinivas Kumar Vs Shametha; (2019) 9 SCC 409

4. Archi Agarwal Vs Principal Judge, Family Court, Lucknow; 2019 (134) ALR 488

5. Anil Kumar Jain Vs Maya Jain (2009) 10 SCC 415

6. Devinder Singh Narula Vs Meenakshi Nangia; (2012) 8 SCC 580

7. K. Thiruvengadam Vs Nil; (2007) 5 CTC 870

8. Miten Vs U.O.I.; (2008) 5 Mah LJ 27

9. Sushama Vs Pramod; (2009) 81 AIC 599 (Bom)

(Delivered by Hon'ble Mahesh Chandra Tripathi, J. & Hon'ble Sanjay Kumar Pachori, J.)

1. Heard Shri Pankaj Agarwal, learned counsel for the appellant (wife) and Ms. Utkarshni Singh, learned counsel for second respondent (husband).

2. The exemption application is allowed. Let the appeal be given regular number.

3. Present first appeal has been preferred assailing the validity of order

dated 12.1.2021 passed by Incharge Principal Judge, Family Court, Gautam Budh Nagar in Divorce Petition No. 592 of 2020 Smt. Priyanka Chauhan v. Saurabh Chauhan, by which application 17/C has been rejected by learned Family Court without assigning any reason. The application 17/C has been filed by the appellant and second respondent supported with a joint affidavit 18/C for waiving six months statutory period for second motion before granting a decree for mutual divorce.

4. The question, which arises for consideration in the instant appeal under Section 19 of the Family Courts Act is whether the minimum period of six months stipulated under Section 13-B(2) of The Hindu Marriage Act, 19551 for motion of passing of decree of divorce on the basis of mutual consent may be relaxed in any exceptional situation.

5. The brief facts leading to the present appeal are that, a Divorce Petition for a decree of dissolution of marriage by mutual consent, was filed by the appellant and second respondent under Section 14 of the Act which was initially registered as Miscellaneous Case No. 89 of 2020, after expiry of one year from the date of marriage, registered as Original Suit. A joint application 17/C under sub-section (2) of Section 13-B the Act, along with joint affidavit 18/C has been filed by the parties stating that the marriage of appellant and second respondent was solemnized on 11.12.2019 with Hindu rites and rituals. The appellant is resident of Rohini, Delhi, whereas the second respondent is resident of Noida, Gautam Budh Nagar. It is contended that from the date of marriage the appellant lived only four days at her matrimonial house and from 16.12.2019 the appellant started residing at her parental house at New Delhi. On account of temperamental and ideological differences the marriage could not be consummated and both are residing separately from 16.12.2019. It is contended that various efforts were made by the family members of both the parties and their well wishers but they could not arrived at settlement to live together a happy married life. When all the efforts for reconciliation stands failed, they ultimately arrived into a settlement in writing dated 24.7.2020 for taking mutual divorce. In view, thereof, the details of articles mentioned in Schedule-A of the mutual settlement dated 24.7.2020 was handed over to the appellant in presence of all the well-wishers. Through mutual settlement dated 24.7.2020 it was further agreed that the articles mentioned in Schedule-B of the agreement shall be put into custody of one Sudhir Kumar son of Sri Jhanda Singh being closed relative and well-wisher of both the parties, which shall be handed over to the appellant after the second motion of divorce petition and recording of statement of appellant in divorce petition to be filed by mutual consent. It is being claimed that without there being any undue influence, threat or coercion the couple decided to dissolve their marriage by a decree of divorce.

6. The Family Court by the impunged order rejected the application 17/C on the ground that till date no effort has been made by the court for reconciliation and mediation between the parties, without considering the peculiar facts of the case. While they pleaded that marriage could not be consummated due to temperamental and ideological differences and both are residing separately from 16.12.2019 i.e. more than one year from the marriage; all the efforts for reconciliation stands failed;

they arrived into a settlement in writing for taking a mutual divorce, articles mentioned in Schedule-A of the mutual settlement dated 24.07.2020 was handedover to the appellant and the articles of both the parties as mentioned in Schedule-B of the settlement put into the custody of one Sudhir Kumar; the parties have genuinely settled their differences including alimony and the statutory period of one year of separation of parties is already over.

7. Section 23 of the Act also provides the procedure regarding the effort to make endeavour to bring about a reconciliation between the parties. Sub-section (1) (bb) of Section 23 of the Act provides that before proceeding to grant any relief under this Act, the court is to be satisfied that a divorce is sought on the ground of mutual consent, such consent has not been obtained by force, fraud or undue influence.

8. Hon'ble the Supreme Court has consistently taken the view that recording of reasons is an essential feature of dispensation of justice. A litigant who approaches the Court with any grievance in accordance with law is entitled to know the reasons for grant or rejection of his prayer. Reasons are the soul of orders. Non-recording of reasons could lead to dual infirmities; firstly, it may cause prejudice to the affected party and secondly, more particularly, hamper the proper administration of justice. These principles are not only applicable to administrative or executive actions, but they apply with equal force and, in fact, with a greater degree of precision to judicial pronouncements. A judgment without reasons causes prejudice to the person against whom it is pronounced, as that litigant is unable to know the ground which weighed with the Court in rejecting his claim and also causes impediments in his taking adequate and appropriate grounds before the higher Court in the event of challenge to that judgment.

9. It is well settled position of law that failure to give reasons amounts to denial of justice. Reasons are live links between the mind of the decision taker to the controversy in question and the decision or conclusion arrived at. Reasons substitute subjectivity by objectivity. The emphasis on recording reasons is that if the decision reveals the "inscrutable face of the sphinx", it can, by its silence, render it virtually impossible for the Courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to reason is an indispensable part of a sound judicial system; reasons at least sufficient to indicate an application of mind to the matter before Court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made; in other words, a speaking out. The "inscrutable face of a sphinx" is ordinarily incongruous with a judicial or quasi-judicial performance.

10. The parties have sought waiver of a period of six months for the second motion on the ground that they have been living separately for last more than one year and there is no possibility of their reunion. Any further delay will affect chances of their resettlement in life.

11. Learned counsel for the appellant has submitted that there is no chance of reconciliation between the parties due to their temperamental and ideological

differences. The marriage has not been consummated and just after four days of marriages both are living separately.

12. Learned counsel for the appellant further submitted that the object of the cooling off the period was to safeguard against a hurried decision if there was, otherwise, possibility of differences being reconciled. The object was not to perpetuate a purposeless marriage or to prolong the agony of the parties when there is no chance of reconciliation.

13. Learned counsel for the second respondent has also supported the arguments so raised by learned counsel for the appellant. She has also submitted that there is no chances of reconciliation and for the interest of the parties this Court may rescue and reprieve the parties.

14. On the matter being taken up on 29.1.2021, on the request of learned counsel for the appellant the matter was adjourned and posted for hearing on 2.2.2021. Ms. Utkarshni Singh, learned counsel has entered appearance on behalf of second respondent. The appellant and the second respondent are also present in the Court. Both the parties made a categorical statement before the Court that there is no chance of reconciliation. It has also been informed that the appellant has completed her C.A. Intermediate. The second respondent is working in IT company. It is submitted that both are educated and consciously they have taken decision to move on independently. Parties have also made statement that there is no chance of reconciliation and their families are also of the same opinion.

15. We have heard rival submissions, perused the record and also considered the statement so given by the parties.

16. The Hindu Marriage Act, 1955 is a special Act dealing with the provisions relating to marriages, restitution of conjugal rights and judicial separation as also nullity of marriage and divorce. (vide: **Jagraj Singh v. Birpal Kaur**2) Under section 13 of the Act marriage can be dissolved by decree of divorce on the various grounds enumerated therein and the same has been further qualified by Section 14 that no petition for divorce to be presented within one year of the marriage. However, an exception has been carved out by inserting a proviso in Section 14, with an intention to mollify the effect of the one year's limit in very exceptional cases as the proviso to Section 14 of the Act engrafts a very important qualification on the general rule laid down in the section that no petition for dissolution of marriage by a decree of divorce can be entertained by the court before the statutory period expires. It enables the court in the exercise of its discretion to grant leave to present such petition before the expiry of the one year's limit in a case of 'exceptional hardship' or 'exceptional depravity' to the appellant.

17. In catena of cases relating to matrimonial dispute, Hon'ble the Apex court has observed that matrimonial disputes have to be decided by Courts in a pragmatic manner keeping in view the ground realities. The fact which pricked the conscience of the Court is that even though the marriage was solemnized on 11.12.2019, the appellant stayed in her matrimonial house only for four days and from 16.12.2019 started living in her parental house. The marriage has not been consummated and they are voluntarily inclined to withdraw from the relationship due to temperamental and ideological differences, which is stated to be not compromised, and they could not enjoy

their happy married life. In such situation, continuance of litigation will cause mental and physical harassment to them unnecessarily, when both of them are not inclined to continue with the relationship at all. We have been principally impressed by the consideration that once the marriage has broken down beyond repair, it would be unrealistic for the law not to take notice of that fact, and it would be harmful to society and injurious to the interests of the parties. Where there has been a long period of continuous separation, it may fairly be surmised that the matrimonial bond is beyond repair. The marriage becomes a fiction, though supported by a legal tie. By refusing to sever that tie the law in such cases does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. Under the traditional Hindu Law, as it stood prior to the statutory law on the point, marriage is a sacrament and cannot be dissolved by consent. The Act enabled the court to dissolve marriage on statutory grounds. By way of amendment in the year 1976, the concept of divorce by mutual consent was introduced. However, Section 13-B(2) contains a bar to divorce being granted before six months of time elapsing after filing of the divorce petition by mutual consent. The said period was laid down to enable the parties to have a rethink so that the court grants divorce by mutual consent only if there is no chance for reconciliation. The object of the provision is to enable the parties to dissolve a marriage by consent if the marriage has irretrievably broken down and to enable them to rehabilitate them as per available options. The amendment was inspired by the thought that forcible perpetuation of status of matrimony between unwilling partners did not serve any purpose. The object of the cooling off the period was to safeguard against a hurried decision if there was, otherwise, possibility of differences being reconciled. The object was not to perpetuate a purposeless marriage or to prolong the agony of the parties when there was no chance of reconciliation.

18. So far as determining the question, whether, the said period is mandatory or directory, the said aspect has been considered by Hon'ble the Apex Court in **Amardeep Singh v. Harveen Kaur**3. The relevant portion of the said judgment is quoted as under:-

"6. This Court noted that power under Article 142 had been exercised in cases where the Court found the marriage to be totally unworkable, emotionally dead, beyond salvage and broken down irretrievably. This power was also exercised to put quietus to all litigations and to save the parties from further agony4. This view was reiterated in Poonam versus Sumit Tanwar5

14. The learned amicus submitted that waiting period enshrined under Section 13-B(2) of the Act is directory and can be waived by the court where proceedings are pending, in exceptional situations. This view is supported by judgments of the Andhra Pradesh High Court in K. Omprakash vs. K. Nalini6, Karnataka High Court in Roopa Reddy vs. Prabhakar Reddy7, Delhi High Court in Dhanjit Vadra vs. Smt. Beena Vadra8, and Madhya Pradesh High Court in Dinesh Kumar Shukla vs. Smt. Neeta9. Contrary view has been taken by Kerala High Court in M. Krishna Preetha vs. Dr. Jayan Moorkkanatt10. It was submitted that Section 13-B(1) relates to jurisdiction of the Court and the petition is maintainable only if the parties are living separately for a period of one year or more and if they

have not been able to live together and have agreed that the marriage be dissolved. Section 13-B(2) is procedural. He submitted that the discretion to waive the period is a guided discretion by consideration of interest of justice where there is no chance of reconciliation and parties were already separated for a longer period or contesting proceedings for a period longer than the period mentioned in Section 13-B(2). Thus, the Court should consider the questions:

(i) How long parties have been married?

(ii) How long litigation is pending?

(iii) How long they have been staying apart?

(iv) Are there any other proceedings between the parties?

(v) Have the parties attended mediation/ conciliation?

(vi) Have the parties arrived at genuine settlement which takes care of alimony, custody of child or any other pending issues between the parties?

15. The Court must be satisfied that the parties were living separately for more than the statutory period and all efforts at mediation and reconciliation have been tried and have failed and there is no chance of reconciliation and further waiting period will only prolong their agony.

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

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

18. In determining the question whether provision is mandatory or directory, language alone is not always decisive. The Court has to have the regard to the context, the subject matter and the object of the provision. This principle, as formulated in Justice G.P. Singh's "Principles of Statutory Interpretation" (9th Edn., 2004), has been cited with approval in Kailash versus Nanhku11. as follows:(SCC pp. 496-97, para 34)

'34.....The study of numerous cases on this topic does not lead to formulation of any universal rule except this that language alone most often is not decisive, and regard must be had to the context, subject-matter and object of the statutory provision in

question, in determining whether the same is mandatory or directory. In an oft-quoted passage Lord Campbell said: ''No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be considered.' (p.338)

''For ascertaining the real intention of the legislature', points out Subbarao, J. ''the court may consider inter alia, the nature and design of the statute, and the consequences which would follow from construing it the one way or the other; the impact of other provisions whereby the necessity of complying with the provisions in question is avoided; the circumstances, namely, that the statute provides for a contingency of the non-compliance with the provisions; the fact that the non-compliance with the provisions is or is not visited by some penalty; the serious or the trivial consequences, that flow therefrom; and above all, whether the object of the legislation will be defeated or furthered'. If object of the enactment will be defeated by holding the same directory, it will be construed as mandatory, whereas if by holding it mandatory serious general inconvenience will be created to innocent persons without very much furthering the object of enactment, the same will be construed as directory."

19. Applying the above to the present situation, we are of the view that where the Court dealing with a matter is satisfied that a case is made out to waive the statutory period under Section 13-B(2), it can do so after considering the following:

(i) the statutory period of six months specified in Section 13-B(2), in addition to the statutory period of one year under Section 13-B(1) of separation of parties is already over before the first motion itself;

(ii) all efforts for mediation/conciliation including efforts in terms of Order 32-A Rule 3 CPC/Section 23(2) of the Act/Section 9 of the Family Courts Act to reunite the parties have failed and there is no likelihood of success in that direction by any further efforts;

(iii) the parties have genuinely settled their differences including alimony, custody of child or any other pending issues between the parties;

(iv) the waiting period will only prolong their agony.

The waiver application can be filed one week after the first motion giving reasons for the prayer for waiver. If the above conditions are satisfied, the waiver of the waiting period for the second motion will be in the discretion of the court concerned."

19. In the aforesaid case, Hon'ble the Apex Court has considered Section 13-B(2) of the Act, divorce by mutual consent and cooling off period of six months and held that the said period is directory with certain conditions under which the court concerned may waive off the said period. The waiting period enshrined under Section 13-B(2) of the Act is directory and can be waived by the court, where, proceedings are pending, in exceptional situation. Hon'ble the Apex Court in Amardeep Singh (Supra) has considered the discretion to waive the period, where, there is no chance of reconciliation and parties were already separated. In such situation it is paramount responsibility to consider the basic issues, which has been stipulated in para 14 of the said judgment as under:-

"(i) How long parties have been married?

(ii) How long litigation is pending?

(iii) How long they have been staying apart?

(iv) Are there any other proceedings between the parties?

(v) Have the parties attended mediation/conciliation?

(vi) Have the parties arrived at genuine settlement which takes care of alimony, custody of child or any other pending issues between the parties?"

20. In **R. Srinivas Kumar v. Shametha**12 Hon'ble the Apex Court considering the facts and circumstances of the case on being satisfied that marriage has irretrievably broken down has held that such marital relationship can be dissolved which is already dead, with a view to do complete justice between the parties. For ready reference, the relevant paragraphs 3.1 and 5.1 of the said judgment are quoted as under:-

"3.1. In support of his alternative submission to dissolve the marriage on the ground of irretrievable breakdown of marriage, learned Senior Advocate has heavily relied upon the following decisions of this Court, Durga Prasanna Tripathy v. Arundathi Tripathy (2005) 7 SCC 353; Naveen Kohli v. Neelu Kohli (2006) 4 SCC 558; Sanghamitra Ghosh v. Kajal Kumar Ghosh (2007) 2 SCC 220; Samar Ghosh v. Jaya Ghosh (2007) 4 SCC 511; K. Srinivas Rao v. D.A. Deepa (2013) 5 SCC 226; and Sukhendu Das v. Rita Mukherjee (2017) 9 SCC 632.....

5.1. At the outset, it is required to be noted and does not seem to be in dispute that since last 22 years both the appellat-husband and the respondent-wife are residing separately. It also appears that all efforts to continue the marriage have failed and there is no possibility of re-union because of the strained relations between the parties. Thus, it appears that marriage between the appellant-husband and the respondent-wife has irretrievably broken down. In the case of Hitesh Bhatnagar (supra), it is noted by this Court that Courts can dissolve a marriage as irretrievably broken down only when it is impossible to save the marriage and all efforts are made in that regard and when the Court is convinced beyond any doubt that there is actually no chance of the marriage surviving and it is broken beyond repair....."

21. In **Archi Agarwal v. Principal Judge, Family Court, Lucknow**13 Hon'ble the Apex Court while considering the exemption of statutory period has held that such application can be allowed in cases of "exceptional hardship" or of "exceptional depravity" as continuance of litigation would cause mental and physical harassment to both the parties.

22. Subject to the provisions of the Act a petition for dissolution of marriage by a decree of divorce may be presented to the Principal Judge, Family Court by both the parties together on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have been mutually agreed that the marriage should be dissolved. For ready reference Section 13B of the Act is quoted as under:-

*"**13B. Divorce by mutual consent**.- (1) Subject to the provisions of this Act a petition for dissolution of marriage by a decree of divorce may be presented to the district court by both the parties to a marriage together, whether such marriage was solemnised before or after the commencement of the Marriage Laws*

(Amendment) Act, 1976 (68 of 1976), on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved.

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

23. Section 13-B itself provides for a cooling period of six months on the first motion being moved, in the event the parties changed their minds during the said period. Accordingly, after the initial motion and the presentation of the petition for mutual divorce, the parties are required to wait for a period of six months before the second motion can be moved, and at that point of time, if the parties have made up their minds that they would be unable to live together, the Court, after making such inquiry as it may consider fit, grant a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree.

24. It is also urged that the other conditions contained in Section 13-B(1) of the Act has also been satisfied as the parties have been living separately for more than a year and had mutually agreed that the marriage should be dissolved. It was urged that except for the formality of not having made an application under Section 13-B, the other criteria has been duly fulfilled and having regard to the language of Section 13-B, a decree of dissolution of the marriage by way of mutual divorce should not be denied to the parties, since one month out of waiting period of six months contemplated under Section 13B had already been completed.

25. Hon'ble the Apex Court in **Anil Kumar Jain v. Maya Jain**14 had invoked its power under Art. 142 of the Constitution of India in the best interest of the parties as it had been urged that technicality should be tempered by pragmatism, if substantive justice was to be done to the parties.

26. It is undoubetedly true that the Legislature had in its wisdom stipulated a cooling period of six months from the date of filing of a petition for mutual divorce till such divorce is actually granted, with the intention that it would save the institution of marriage. In such situation the intention of the Legislature cannot be faulted with, but there may be occasions when in order to do complete justice to the parties it becomes necessary for this Court to invoke its discretion in an irreconcilable situation.

27. Hon'ble the Apex Court in **Devinder Singh Narula v. Meenakshi Nangia**15 has considered the cooling off period of six months prior to filing of second motion under Section 13-B in the backdrop that the parties living separately for more than one year, no formal ties of marriage between the parties and the marriage is subsisting by a tenuous thread on account of the statutory cooling off period, out of which four months have already expired. The Supreme Court observed that there is no reason to continue

the agony of the parties for another two months, when it is not possible for the parties to live together and to discharge their marital obligations towards each other for more than one year. The relevant portion of the said judgment is quoted as under:-

"10. As will appear in the averments made in this appeal, the appellant filed a petition under Section 12 of the Hindu Marriage Act on 1.6.2011 on the ground that the marriage contracted on 26.3.2011, was a nullity; that the parties had been living separately since their marriage and have not cohabitated with each other since 1.6.2011 and in future also they could never live together under one roof. According to the parties, they are residing separately from each other for the last one year and the respondent was presently working overseas in Canada. It is with such object in mind that during the pendency of the proceedings under Section 12 of the Act the parties agreed to mediation and during mediation the parties agreed to dissolve their marriage by filing a petition under Section 13-B of the above Act for grant of divorce by mutual consent.

11. In the proceedings before the Mediator, the parties agreed to move appropriate petitions under Section 13-B(1) and 13-B(2) of the Act. A report was submitted by the Mediator of the Mediation Centre of the Tis Hazari Courts to the Court in the pending HMA No.239 of 2011. It is pursuant to such agreement during the mediation proceedings that an application was filed by the parties in the aforesaid pending HMA on 15.12.2011 indicating that they had settled the matter through the mediation centre and that they would be filing a petition for divorce by mutual consent on or before 15.4.2012. On the strength of the said petition, the HMA proceedings were disposed of as withdrawn. Subsequently, on 13.4.2012 the parties filed a joint petition under Section 13-B of the Act on which the order came to be passed by the learned Additional District Judge -01, West Delhi, fixing the date for the second motion on 15.10.2012.

12. It is quite clear from the materials on record that although the marriage between the parties was solemnized on 26.3.2011, within 3 months of the marriage the petitioner filed a petition under Section 12 of the Hindu Marriage Act, 1955, for a decree of nullity of the marriage. Thereafter, they have not been able to live together and lived separately for more than 1 year. In effect, there appears to be no marital ties between the parties at all. It is only the provisions of Section 13-B(2)of the aforesaid Act which are keeping the formal ties of marriage between the parties subsisting in name only. At least the condition indicated in Section 13-B for grant of a decree of dissolution of marriage by the mutual consent is present in the instant case. It is only on account of the statutory cooling off period of six months that the parties have to wait for a decree of dissolution of marriage to be passed.

13. In the above circumstances, in our view, this is one of those cases where we may invoke and exercise the powers vested in the Supreme Court under Article 142 of the Constitution. The marriage is subsisting by a tenuous thread on account of the statutory cooling off period, out of which four months have already expired. When it has not been possible for the parties to live together and to discharge their marital obligations towards each other for more than one year, we see no reason to continue the agony of the parties for another two months.

14. We, accordingly, allow the appeal and also convert the pending proceedings

under Section 12 of the Hindu Marriage Act, 1955, before the Additional District Judge-I, West Delhi, into one underSection 13-B of the aforesaid Act and by invoking our powers under Article 142 of the Constitution, we grant a decree of mutual divorce to the parties and direct that the marriage between the parties shall stand dissolved by mutual consent. The proceedings before the Additional District Judge-I, West Delhi, being HMA No.204 of 2012, is withdrawn to this Court on consent of the parties and disposed of by this order....."

28. In **K. Thiruvengadam v. Nil**16 it was held that though it is obligatory for courts to make last minute efforts to save marriage, where there is no possibility of re-union and when process of divorce by mutual consent has been adopted it is open to court to waive 6 months' period. Section 13-B is only directory and not mandatory and if held to be mandatory it would frustrate very liberalised concept of divorce by mutual consent.

29. In **Miten v. Union of India**17 it was observed that three ingredients had to be satisfied before the court to a relief under Section 13-B to the parties: (i) the parties had been living separately for a period of more than a year, (ii) they had not been able to live together and (iii) that they have mutually agreed to dissolve the marriage. Once these three statutory conditions are satisfied then it gives jurisdiction to the court to entertain a petition for divorce by mutual consent. Purpose of introducing mutuality was not to dissolve the marriage between the newly wed at the drop of the hat without any reason/ jurisdiction.

30. The court on the very first date, must satisfy itself that consent is not obtained for divorce by force, fraud or undue influence and must reveal it in order of court. (vide: **Sushama v. Pramod**18).

31. In the present matter on the second day of hearing both the parties were present and separately they made a categorical statement that within four days of their solemnisation of marriage they departed and even the marriage has not been consummated. Both are literate and decided with full conscious mind that they have to be separated. We have also tried to get an impression whether the said statement is with free will or not. They had no hesitation in responding that there is no force, fraud or undue influence while reaching to such decision.

32. Considering the facts and circumstances of the case, we are of the view that it will be open to the Court to exercise its discretion in the facts and circumstances of each case where there is no possibility of parties resuming cohabitation and there are chances of alternative rehabilitation. In the present matter the wife remained in her matrimonial house only for four days and for more than one year they are living separately. The marriage has never been consummated. They also make statement before the Court that they do not want to live together and there is no chance of reconciliation and the waiting period will only prolong their agony. They have made statement that they have better future prospects if divorce is allowed.

33. In view of the above and keeping in mind the legal position, we are of the considered opinion that learned Incharge Principal Judge, Family Court rejected the application 17/C without considering the facts of the case as well as law laid down by

the Apex Court, therefore, the order impugned is set aside. The application 17/C is allowed. The present first appeal **allowed** accordingly. Learned Principal Judge, Family Court is directed to decide the Original Suit No. 592 of 2020 expeditiously or preferably within 7 days after producing the computerized copy of this judgment.

34. The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad, self attested by the appellant/respondent along with a self attested identity proof of the said person (preferably Aadhar Card) mentioning the mobile number to which the said Aadhar Card is linked.

35. The concerned Court /Authority /Official shall verify the authenticity of such computerized copy of the order from the official website of High Court Allahabad and shall make a declaration of such verification in writing.

(2021)06ILR A116
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.07.2017

BEFORE

THE HON'BLE DILIP GUPTA, J.
THE HON'BLE AMAR SINGH CHAUHAN, J.

First Appeal (D) No. 200 of 2017

Upendra Singh @ Omji ...Appellant
Versus
Abbyan Singh @ Kanhaiya & Ors. ...Respondents

Counsel for the Appellant:
Sri Mridul Kumar

Counsel for the Respondents:

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A. Civil Law - Hindu Adoptions and Maintenance Act, 1956 – Section 20 – Father's liability to maintain son – Expenses of treatment, claimed – Maintenance – Scope and definition – Son is suffering from heart disease – Held, 'Maintenance' includes provision for food, clothing, residence, education of the children and medical attendance or treatment – Appellant-father is able to provide medical expenses and maintenance – He cannot escape liability by raising plea that son is living with his mother. (Para 7 and 8)

First Appeal dismissed. (E-1)

Cases relied on :-

1. State of Haryana Vs Smt. Santra, AIR 2000 SC 1888

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

1. The appellant Upendra Singh @ Omji, has preferred this First Appeal under Section 19 of the Family Courts Act against the judgment and order dated 26 September 2016 passed by the Principle Judge, Family Court, Jalaun at Orai in Original Suit No. 26 of 2014 (Abbyan Singh and another vs. Upendra Singh and another) whereby the court below has awarded Rs. 3,000/- per month for medical expenses and Rs. 1,000/- per month for maintenance to Abbyan Singh (respondent no. 1).

2. The brief facts which are requisite to be stated for the adjudication of the present appeal are that a regular suit was filed under Section 20 of the Hindu Adoptions and Maintenance Act for getting maintenance of their minor son (respondent no. 1) claiming Rs. 7,000/- per month, who is residing with respondent no. 2,Smt. Poonam Raje. It is averred that marriage of respondent no. 2, Smt. Poonam Raje was

solemnized with appellant Upendra Singh @ Omji on 17 November 2010 according to Hindu rites and rituals, and out of the said wedlock, one male issue namely Abbyan Singh @ Kanhaiya was born, who is 18 months old at present. Unfortunately, he is suffering from heart disease and there is shrinkage and hole in the valve of his heart. The appellant did not provide him the medical treatment. Respondent no. 2, who is teacher in a school, however managed to give treatment but the expenses are very high and cannot be afforded by her. The appellant is doing business and he possesses Tractor, Scorpio, used taxi, J.C.B. Machine and also agricultural land from which his annual income is more than Rs. 13 lakhs and, therefore, the respondents seek relief for grant of maintenance and lastly prayed that defendant be directed to give Rs. 7,000/- per month in lieu of maintenance, treatment and education of their minor son.

3. The defendant filed a written statement and pleaded inter alia that he has paid Rs. 2,50,000/- for the medical treatment of respondent no. 1; that respondent no. 2 left his house without any reason and also used to under estimate him; that respondent no. 2 is teacher and earning Rs. 35,000/- per month and her father is a rich person and business-man who possesses agricultural land also.

4. On the basis of the pleadings of the parties, following issues were framed by the Principal Judge, Family Court:-

a. Whether the respondent no. 1 is entitled to get maintenance?

b. Whether the respondent no. 1 is entitled to get some money for treatment after creating charges of the property of the appellant?

5. The Principle Judge, Family Court, Jalaun at Orai, after hearing the parties and perusing the records, partly decreed the suit. The appellant was directed to give Rs. 3,000/- per month towards medical expenses and Rs. 1,000/- per month in lieu of maintenance and education of the minor son i.e., respondent no. 1.

6. Before adverting to the claim of the parties, it is necessary to reproduce Section 20 of the Hindu Adoptions and Maintenance Act:-

"20. Maintenance of children and aged parents- (i) Subject to the provisions of this section a Hindu is bound, during his or her lifetime, to maintain his or her legitimate or illegitimate children and his or her aged or infirm parents.

(ii) A legitimate or illegitimate child may claim maintenance from his or her father or mother so long as the child is a minor.

(iii) The obligation of a person to maintain his or her aged infirm parent or a daughter who is unmarried extends in so far as the parent or the unmarried daughter, as the case may be, is unable to maintain himself or herself out of his or her own earnings or other property."

7. In this appeal, the main point of determination is that whether the appellant is under a legal obligation to maintain respondent no. 1 who is the legitimate son of appellant and suffering from heart disease. It has come in the evidence that appellant is a business-man who possesses Tractor, Scorpio vehicle, J.C.B. Machine and also agricultural land. Therefore, he is able to provide medical expenses and maintenance. 'Maintenance' includes provision for food, clothing, residence, education of the children and medical

attendance or treatment. The Supreme Court in the case of **State of Haryana vs. Smt. Santra, AIR 2000 SC 1888** held that a Hindu is under a legal obligation to maintain his wife, minor son, unmarried daughter and old aged parents, whether he possesses any property or not. The obligation to maintain these relations is personal, legal and absolute that arises from the very existence of the relationship of the parties.

8. Section 20 of the Hindu Adoptions and Maintenance Act gives statutory form to the legal obligation of a Hindu also to maintain his minor son and his aged or infirm parents. The appellant cannot escape liability by raising plea that respondent no. 1 is living with respondent no. 2.

9. The impugned judgement, which has considered the various aspects in detail, does not call for any interference.

10. The appeal, therefore, liable to be dismissed and is dismissed.

(2021)06ILR A118
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.11.2019

BEFORE

THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE RAJEEV MISRA, J.

First Appeal No. 327 of 2017

Surendra Pratap Singh ...Appellant
Versus
Dr. Vishwaraj Singh ...Respondent

Counsel for the Appellant:
Sri Ganesh Shanker Srivastava

Counsel for the Respondent:

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A. Civil Law - Hindu Marriage Act, 1955 – Section 13 (ia) – Family Courts Act, 1984 – Section 19(1) – Matrimonial dispute – Divorce on the ground of cruelty – Cruelty, scope and application thereof – Cruelty may be mental or physical, intentional or unintentional – If it is physical, it is a question of fact about degree. If it is mental, the enquiry must begin as to the nature of cruel treatment – Mental cruelty is the conduct of other spouse which causes mental suffering or fear to matrimonial life of other. It postulates a treatment of party to marriage with such conduct as to cause a reasonable apprehension in his or her mind that it would be harmful or injurious to live with other party – Held, plaint do not satisfy pleadings needed for a case of divorce founded on cruelty and that being so, evidence also has not been led to prove cruelty – Trial Court's order holding that plaintiff-appellant has failed to prove cruelty, affirmed. (Para 26, 28 and 32)

B. Hindu Marriage Act, 1955 – Section 13 – Divorce – Ground of irretrievable break down, application thereof – Parties are living separately for the last one year – Held, under Section 13 of Act, 1955, divorce is not permitted on the ground that marriage has become irretrievable – Power of Supreme Court under Article 42 of the Constitution is not vested in High Court. (Para 33 and 37)

First Appeal dismissed. (E-1)

Cases relied on :-

1. Samar Ghosh Vs Jaya Ghosh; (2007) 4 SCC 511

2. N.G. Dastane Vs S. Dastane; (1975) 2 SCC 326

3. Sirajmohmedkhan Janmohamadkhan Vs Haizunnisa Yasinkhan & anr.; (1981) 4 SCC 250

4. Shobha Rani Vs Madhukar Reddi; (1988) 1 SCC 105

5. V. Bhagat Vs D. Bhagat (Mrs.); (1994) 1 SCC 337

6. Savitri Pandey Vs Prem Chandra Panadey, (2002) 2 SCC 73

7. A. Jayachandra Vs Aneel Kaur; (2005) 2 SCC 22

8. Vinita Saxena Vs Pankaj Pandit; (2006) 3 SCC 778

9. First Appeal No. 525 of 2006; Smt. Kavita Sharma Vs Neeraj Sharma decided by Allahabad High Court on 7.2.2018

10. First Appeal No. 792 of 2008; Ashwani Kumar Kohli Vs Smt. Anita decided by Allahabad High Court on 17.11.2016

11. Chetan Dass Vs Kamla Devi; (2001) 4 SCC 250

12. Civil Appeal No.4696 of 2013; R. Srinivas Kumar Vs R. Shametha, decided by Supreme Court on 04.10.2019

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

1. Heard Sri Ganesh Shanker Srivastava, learned counsel for appellant. None has appeared on behalf of respondent though vide order dated 01.05.2017, notice was issued to sole respondent. Vide order dated 12.07.2018, service was deemed sufficient. Hence, we proceed to hear and decide this appeal exparte.

2. This is plaintiff's appeal under Section 19(1) of Family Court Act, 1984 (*hereinafter referred to as "Act, 1984*") arisen from judgement dated 22.03.2017 and decree dated 07.04.2017 passed by Smt. Shaily Rai, Additional Principal Judge/Additional District and Sessions Judge/ Fast Track Court No. 1, Varanasi, dismissing appellant's Matrimonial Petition No. 189 of 2007 filed under Section 13 of Hindu Marriage Act, 1955 (*hereinafter referred to as "Act, 1955*") seeking divorce on the ground of cruelty.

3. Plaintiff-appellant instituted Matrimonial Petition No.189 of 2007, under Section 13 of Act, 1955 with a prayer that matrimonial relations between plaintiff and defendant be revoked by granting decree of divorce.

4. The plaint case set up by appellant vide plaint dated 10.08.2007 is that he is resident of village Amar Lok Hospital, Uska Road, Siddharthanagar, Tappa-Dharauli, Pargana, Tehsil- Naugarh, District Siddharthanagar while defendant-respondent is resident of Varanasi. Marriage between parties was solemnized on 04.05.2003 according to Hindu Rituals. Defendant after marriage came to her in-laws house and started discharging her matrimonial duties and both were living happily. Both the parties are well educated. Defendant by profession is Doctor. Defendant's father Professor Daya Shanker Singh has generally stayed abroad. Defendant was also born at abroad and has stayed with her father in different countries like, South Africa, America etc. Defendant is an expert Doctor, therefore, parties jointly constructed Amar Lok Hospital for medical practice of defendant. With the passage of time, understanding between the two got disturbed since defendant has mostly lived abroad and enjoyed open lifestyle. Misunderstanding between the two resulted in some criminal cases also which were pending at the time of filing of matrimonial petition. Situation has come where both the parties have lost confidence among them and it is difficult to live together. Further on account of criminal cases, mental stress has reached a stage where both cannot live together under a single roof and causing mental and physical harassment to plaintiff. Both have no nuptial relations for the last one year. Relations of husband and wife have ceased

and defendant has also not discharged her duties as wife. It has resulted in a hell like life to the parties. It is impossible for both to live together. Plaintiff repeatedly asked defendant to have a mutual divorce but she has not agreed. Cause of action arose in the first week of August, 2007 when defendant declined to cooperate for mutual divorce.

5. Matrimonial Petition was contested by defendant by filing written statement dated 13.11.2007 who stated that it is the plaintiff who has been harassing defendant mentally and physically throughout. He induced defendant to marry him on the pretext that he is a Doctor but later on, it was revealed that he was not a Doctor and, therefore, he has cheated defendant. For construction of Amar Lok Hospital except loan money, which was sanctioned by State Bank of India, Siddharthanagar under Doctor Plus Scheme, entire money was arranged and invested by defendant and plaintiff has not contributed any single penny therefor. Allegation that foreign stay of defendant has caused in marital differences is incorrect and defendant has not harassed plaintiff in any manner and it is otherwise. Plaintiff has made dowry demand time and again and also caused physical and mental cruelty making her life a hell.

6. Aforesaid petition was initially filed in the Court of Civil Judge (Senior Division), Siddharthanagar. Defendant filed a Transfer Petition (Civil) No.142 of 2008 in Supreme Court and thereupon vide judgement dated 03.01.2011, it was transferred to the Court of competent jurisdiction at Varanasi.

7. For expeditious disposal of the suit, plaintiff filed Writ Petition No.45971 of 2011 which was disposed of vide judgement dated 12.08.2011 directing Court below to decide suit expeditiously without giving unnecessary adjournment to the parties.

8. Defendant sought amendment in written statement and sought to insert following paras and schedule:-

''16ए. यह कि वादी बहुत ही चालाक व मुकदमेबाज व्यक्ति है और वादी अपने को डाक्टर जाहिर करता था और जिसके बावत हम प्रतिवादिनी के माता–पिता व रिश्तेदारी, वादी के बातों पर पूर्णरूप से विश्वास करके हम प्रतिवादिनी की शादी साथ वादी/ याची मुताबिक हिन्दू धर्मशास्त्र व रीति रिवाज बिरादरी के रूपया पैसा खर्च करके किया था। चूंकि हम प्रतिवादिनी के माता–पिता काफी सम्पन्न थे, चुनान्चे उन्होंने हम प्रतिवादिनी को व वादी / याची को काफी रूपया व जेवरात व मोटर कार व अन्य सामान बरवक्त विवाह हम प्रतिवादिनी व याची को दिया था, अलावा इसके बिदायी के समय हम प्रतिवादिनी को अलग से काफी आभूषण व कपड़ा भी दिया था, जिसका विवरण नीचे दिया गया है।

16बी. यह कि बाद विवाह मजकूर हम प्रतिवादिनी व याची / वादी के सम्बन्ध काफी मधुर व अच्छे थे, चुनान्चे हम प्रतिवादिनी व याची / वादी ने मिल करके ''अमर लोक सेवाश्रम'' मजकूर के लिए जमीन भी क्रय करके उस पर ''अमर लोक सेवाश्रम'' मजकूर कायम किया।

16सी. यह कि बाद शादी मजकूर जब हम हम प्रतिवादिनी को मालूम हुआ कि वादी / याची क्वालिफाइड डाक्टर नहीं हैं और उसके पास फर्जी डिग्री है, और उसने हम प्रतिवादिनी के माता–पिता व रिश्तेदारों को भी धोखा दे कर तथा खुद को डाक्टर बता हम प्रतिवादिनी को धोखा देकर हम प्रतिवादिनी से शादी कर लिया है, जिसकी जानकारी होने पर वादी / याची व प्रतिवादिनी में मनमुटाव हो गया और वादी / याची अपनी कमी को छिपाने के लिए हमेशा हम प्रतिवादिनी को मारपीट व झगड़ा फसाद करने लगा और अन्तोगत्वा हम प्रतिवादिनी को मारपीट करके जबरदस्ती घर से निकाल दिया और हम प्रतिवादिनी को जब याची / वादी ने जबरदस्ती घर से निकाला तब वादी / याची ने हम प्रतिवादिनी मजकूर का सभी आभूषण व कपड़ा वगैरह जो कि हम प्रतिवादिनी को हम प्रतिवादनी के माता–पिता ने विवाह के वक्त दिया था सभी वस्त्राभूषण अपने पास रख लिया और वह आज भी याची / वादी के पास हैं।

16डी. यह कि हम प्रतिवादिनी ने जब वादी/ याची से उक्त आभूषण वगैरह जो वरवक्त विवाह हम

प्रतिवादिनी के माता–पिता ने जो हम प्रतिवादिनी को दिया था, उसे मांगा तब वादी / याची ने उसे देने से इन्कार कर दिया तथा यानि हम प्रतिवादिनी से अलग से दहेज की मांग करने लगा।

17 ई. यह कि वादी / याची ने मुकदमा हाजा में जो कारण विवाह विच्छेद का दिया है, वह गलत व बनावटी है, और वादी /याची ने माकूल वजह नहीं दिया और जो कारण दिया है, वह दफा– 13 हिन्दू मैरिज एक्ट के शर्तों को पूरा नहीं करता है, चुनान्चे इस आधार पर भी दावा वादी / याची मय खरचा के खारिज किया जावे।

16 एफ. यह कि हम प्रतिवादिनी ने बार–बार वादी / याची से कहा कि वह इस वदोत्तर के अन्त में दिये गये उल्लिखित सामान जिसकी कीमत मुबलिग–37,50,000 रूपया होती है, हम प्रतिवादिनी मजकूर को अदा कर देवे और वक्त अदायगी के बावत हम प्रतिवादिनी से रसीद तहरीर करा लेवे किन्तु वादी / याची जानबूझ करके हम प्रतिवादी के उक्त आभूषण को हड़प करने की गरज से उक्त आभूषण व सामानों का विवरण जो नीचे दिया गया है, को देने से भी इकार कर दिया जिसको पाने का मुस्तहक व हकदार हम प्रतिवादिनी मजकूर है।

ख. यह कि वादोत्तर के प्रस्तावित तरमीम के पैरा–16 एफ. के बाद निम्नलिखित विवरण सम्पत्ति निम्नलिखित रूप से इजाफा किया जावेः–

।। विवरण सम्पत्ति।।

व विवरण समान जो वरवक्त शादी में प्रतिवादिनी के माता पिता द्वारा दिया गया हैः–

1. सोने का झुमका दो जोडी वनज 20 ग्राम
2. सोने का गले का हर एक नग वनज 75 ग्राम
3. सोने की अंगूठी दो नग वनज 10 ग्राम
4. करधनी सोने की एक नग वनज 446 ग्राम
5. सोने की मरदानी अंगूठी 5 नग 32 ग्राम
6. सोने की सिकडी मरदानी वजन 266''
7. सोने का गले का हार प्ण्डल एक नग 87''
8. सोने का झुमका एक जोडी 2 नग 18''
9. सोने की अंगूठी एक नग वनज 04''
10. सोने का कंगन 3 सेट 6 पीस 368''
*11- eaxy lw= lksus dk nks ihl out 78***
12. बिछुआ सोने की 3 जोडी वनज 120''
13. चूड़ी हाथ की सोने की 12 नग 312''

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कुल सोना 1 किग्रा0 842 ग्राम
14. करधनी कमर की 2 नग वनज 3.00 कि.ग्रा.
15. पैर का पायल 8 नग वनज 3.00''
16. पैर की विछिया 6 जोड़ी 42 कि.ग्रा.

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6.42 ग्राम

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सोने के जेवरात मजकूर की कीमत मुबलिग–35,00,000 रूपया

व चांदी के जेवरात मजकूर की कीमत 2,50,000 रूपया

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कुल योग 37,50,000 रूपया

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प्रतिवादिनी''

9. Defendant, therefore, placed a counter claim in respect of her Streedhan.

10. Counter claim of defendant was contested and denied by plaintiff by filing objection.

11. Trial Court formulated following three issues:-

''1. क्या याची वाद पत्र के कथनों के आधार पर प्रत्युत्तरदाता के विरूद्ध विवाह विच्छेद की डिक्री पाने का अधिकारी है?

2. क्या वाद इस न्यायालय के क्षेत्राधिकार के बाहर है?

3. क्या याची किसी अन्य अनुतोष को प्राप्त करने का अधिकारी है?''

12. In support of plaint, plaintiff examined himself as PW-1, Laljee as PW-2, Ram Lautan Singh as PW-3 who filed their affidavit as a part of examination-in-chief and thereafter cross-examined by defendant.

13. Oral evidence of defendant comprised of her own statement as DW-1, statements of Ritiraj Singh as DW-2, Pawan Kumar Singh as DW-3 and Manoj Kumar Singh as DW-4. Besides, documentary evidence was also filed by defendant and detailed in the judgement of Trial Court.

14. Trial Court found that virtually, there was no pleading giving instances of cruelty, mental or otherwise justifying

decree of divorce on the ground of cruelty under Section 13 of Act, 1955. Minor differences between the parties did not come within the ambit of 'cruelty' justifying divorce. Trial Court, therefore, answered question-1 against plaintiff-appellant holding that he failed to prove its case by pleadings and evidence.

15. Issue-2 was also answered against plaintiff and, thereafter, issue-3 was also answered against plaintiff.

16. Before this Court, learned counsel for appellant contended that Trial Court has committed manifest error in observing that plaintiff failed to prove its case of 'cruelty' and secondly, contended that parties are not residing together for the last 13 years and marriage has become irretrievable, therefore, divorce should have been granted in the present case.

17. Two points for determination has arisen in this appeal which are:-

(i) Whether appellant has pleaded and proved the incident of cruelty and Court below has wrongly taken a view otherwise.

(ii) Whether decree of judgement of Court below can be reversed on the ground that marital relations are irretrievable.

18. Before proceeding to consider question-1, it would be appropriate to reproduce Section 13 of Act, 1955:-

"13. Divorce. --(1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party--

(i) has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse; or

(ia) has, after the solemnization of the marriage, treated the petitioner with cruelty; or

(ib) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or

(ii) has ceased to be a Hindu by conversion to another religion; or

(iii) has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.

Explanation.--In this clause,--

(a) the expression "mental disorder" means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia;

(b) the expression "psychopathic disorder" means a persistent disorder or disability of mind (whether or not including sub-normality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the other party, and whether or not it requires or is susceptible to medical treatment; or]

(iv) has, [***] been suffering from a virulent and incurable form of leprosy; or

(v) has, [***] been suffering from venereal disease in a communicable form; or

(vi) has renounced the world by entering any religious order; or

(vii) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it, had that party been alive;

Explanation. In this sub-section, the expression "desertion" means the desertion

of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the wilful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expressions shall be construed accordingly.

(1-A) Either party to a marriage, whether solemnised before or after the commencement of this Act, may also present a petition for the dissolution of the marriage by a decree of divorce on the ground--

(i) that there has been no resumption of cohabitation as between the parties to the marriage for a period of one year or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties; or

(ii) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of one year or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties.

(2) A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground,---

(i) in the case of any marriage solemnised before the commencement of this Act, that the husband had married again before such commencement or that any other wife of the husband married before such commencement was alive at the time of the solemnisation of the marriage of the petitioner:

Provided that in either case the other wife is alive at the time of the presentation of the petition; or

(ii) that the husband has, since the solemnisation of the marriage, been guilty of rape, sodomy or bestiality; or

(iii) that in a suit under section 18 of the Hindu Adoptions and Maintenance Act, 1956 (78 of 1956), or in a proceeding under section 125 of the Code of Criminal Procedure, 1973 (2 of 1974) or under the corresponding section 488 of the Code of Criminal Procedure, 1898 (5 of 1898), a decree or order, as the case may be, has been passed against the husband awarding maintenance to the wife notwithstanding that she was living apart and that since the passing of such decree or order, cohabitation between the parties has not been resumed for one year or upwards; or

(iv) that her marriage (whether consummated or not) was solemnised before she attained the age of fifteen years and she has repudiated the marriage after attaining that age but before attaining the age of eighteen years.

Explanation. --This clause applies whether the marriage was solemnised before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976).

STATE AMENDMENT

Uttar Pradesh.-- In its application to Hindus domiciled in Uttar Pradesh and also when either party to the marriage was not at the time of marriage a Hindu domiciled in Uttar Pradesh, in Section 13--

(i) in sub-section (1), after clause (i) insert and shall be deemed always to have been inserted the following

"(1-a) has persistently or repeatedly treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party; or", and

(ii) for clause (viii) (since repealed) substituted and deem always to have been so substituted for following.

" (viii) has not resumed cohabitation after the passing of a decree for judicial separation against that party and--

(a) a period of two years has elapsed since the passing of such decree, or

(b) the case is one of exceptional hardship to the petitioner or of exceptional depravity on the part of other party; or"."

19. Section 13 (ia) of Act of 1955 clearly provides that a decree of divorce can be granted, in case, after solemnization of marriage, petitioner has been treated with 'cruelty'.

20. In Samar **Ghosh vs. Jaya Ghosh (2007) 4 SCC 511**, Court considered the concept of cruelty and referring to Oxford Dictionary defines 'cruelty' as 'the quality of being cruel; disposition of inflicting suffering; delight in or indifference to another's pain; mercilessness; hard-heartedness'.

21. In Black's Law Dictionary, 8th Edition, 2004, term "mental cruelty" has been defined as, "a ground for divorce, one spouse's course of conduct (not involving actual violence) that creates such anguish that it endangers the life, physical health, or mental health of the other spouse."

22. The concept of cruelty has been summarized in Halsbury's Laws of England, Vol.13, 4th Edition Para 1269, as under:

"The general rule in all cases of cruelty is that the entire matrimonial relationship must be considered, and that rule is of special value when the cruelty consists not of violent acts but of injurious reproaches, complaints, accusations or taunts. In cases where no violence is averred, it is undesirable to consider judicial pronouncements with a view to creating certain categories of acts or conduct as having or lacking the nature or quality which renders them capable or incapable in all circumstances of amounting to cruelty; for it is the effect of the conduct rather than its nature which is of paramount importance in assessing a complaint of cruelty. Whether one spouse has been guilty of cruelty to the other is essentially a question of fact and previously decided cases have little, if any, value. The court should bear in mind the physical and mental condition of the parties as well as their social status, and should consider the impact of the personality and conduct of one spouse on the mind of the other, weighing all incidents and quarrels between the spouses from that point of view; further, the conduct alleged must be examined in the light of the complainant's capacity for endurance and the extent to which that capacity is known to the other spouse. Malevolent intention is not essential to cruelty but it is an important element where it exits."

23. In 24 American Jurisprudence 2d, the term "mental cruelty" has been defined as under:

"Mental Cruelty as a course of unprovoked conduct toward one's spouse which causes embarrassment, humiliation, and anguish so as to render the spouse's life miserable and unendurable. The plaintiff must show a course of conduct on the part of the defendant which so endangers the physical or mental health of the plaintiff as to render continued cohabitation unsafe or improper, although the plaintiff need not establish actual instances of physical abuse. "

24. One of the earliest decision considering "mental cruelty" we find is, **N.G. Dastane v. S. Dastane (1975) 2 SCC 326**, wherein Court has said:

"The enquiry therefore has to be whether the conduct charged as cruelty is of such a character as to cause in the mind of the petitioner a reasonable apprehension that it will be harmful or injurious for him to live with the respondent. "

25. In **Sirajmohmedkhan Janmohamadkhan v. Haizunnisa Yasinkhan and Anr. (1981) 4 SCC 250** Court said that concept of legal cruelty changes according to the changes and advancement of social concept and standards of living. With the advancement of our social conceptions, this feature has obtained legislative recognition, that a second marriage is a sufficient ground for separate residence and maintenance. Moreover, to establish legal cruelty, it is not necessary that physical violence should be used. Continuous ill-treatment, cessation of marital intercourse, studied neglect, indifference on the part of the husband, and an assertion on the part of the husband that the wife is unchaste are all factors which lead to mental or legal cruelty.

26. In **Shobha Rani v. Madhukar Reddi, (1988) 1 SCC 105** Court observed that word 'cruelty' has not been defined in Act, 1955 but legislature, making it a ground for divorce under Section 13(1)(i)(a) of Act, 1955, has made it clear that conduct of party in treatment of other if amounts to cruelty actual, physical or mental or legal, is a just reason for grant of divorce. Cruelty may be mental or physical, intentional or unintentional. If it is physical, it is a question of fact about degree. If it is mental, the enquiry must begin as to the nature of cruel treatment and then as to the impact of such treatment on the mind of the spouse. Whether it caused reasonable apprehension that it would be harmful or injurious to live with the other, ultimately, is a matter of inference to be drawn by taking into account the nature of conduct and its effect on the complaining spouse. There may, however, be cases where conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or injurious effect on the other spouse need not be enquired into or considered. In such cases, cruelty will be established if conduct itself is proved or admitted. The absence of intention should not make any difference in the case, if by ordinary sense in human affairs, the act complained of could otherwise be regarded as cruelty.

27. In **V. Bhagat v. D. Bhagat (Mrs.), (1994) 1 SCC 337** considering the concept of "mental cruelty" in the context of Section 13(1)(i)(a) of Act, 1984, Court said that it can be defined as conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with other. In other words, mental cruelty must be of such a nature that the parties cannot reasonably be expected to live together. The situation must be such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party. It is not necessary to prove that mental cruelty is such as to cause injury to the health of other party. While arriving at such conclusion, regard must be had to the social status, educational level of parties, the society they move in, the possibility or otherwise of the parties ever living together in case they are already living apart and all other relevant facts and circumstances which it is neither possible nor desirable to set out exhaustively. What is cruelty in one case may not amount to cruelty in another case. It is thus has to be determined in each case having regard to the facts and circumstances of each case.

28. In **Savitri Pandey v. Prem Chandra Panadey, (2002) 2 SCC 73**, Court held that mental cruelty is the conduct of other spouse which causes mental suffering or fear to matrimonial life of other. Cruelty postulates a treatment of party to marriage with such conduct as to cause a reasonable apprehension in his or her mind that it would be harmful or injurious to live with other party. Cruelty has to be distinguished from ordinary wear and tear of family life.

29. In **A. Jayachandra v. Aneel Kaur, (2005) 2 SCC 22**, Court observed that conduct of spouse, if established, an inference can legitimately be drawn that treatment of spouse is such that it causes an apprehension in the mind of other spouse, about his or her mental welfare then this conduct amounts to cruelty. Court observed that when a petition for divorce on the ground of cruelty is considered, Court must bear in mind that the problems before it are those of human beings and psychological changes in a spouse's conduct have to be borne in mind before disposing of petition for divorce. Before a conduct can be called cruelty, it must touch a certain pitch of severity. Mere trivial irritations, quarrels between spouses, which happen in day-to-day married life, may also not amount to cruelty.

30. In **Vinita Saxena v. Pankaj Pandit, (2006) 3 SCC 778** Court held that complaints and reproaches, sometimes of ordinary nature, may not be termed as 'cruelty' but their continuance or persistence over a period of time may do so which would depends on the facts of each case and have to be considered carefully by the Court concerned.

31. In **Samar Ghosh vs. Jaya Ghosh (supra)**, Court also said that though no uniform standard can be laid down but there are some instances which may constitute mental cruelty and the same are illustrated as under:

"(i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.

(ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party.

(iii) ***Mere coldness or lack of affection cannot amount to cruelty****, frequent rudeness of language, petulance of manner, indifference and neglect may reach such a degree that it makes the married life for the other spouse absolutely intolerable.*

(iv) Mental cruelty is a state of mind. The ***feeling of deep anguish, disappointment, frustration*** *in one spouse caused by the conduct of other* ***for a long time*** *may lead to mental cruelty.*

(v) A ***sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable*** *life of the spouse.*

(vi) ***Sustained unjustifiable conduct and behavior of one spouse actually affecting physical and mental health of the other spouse****. The treatment complained of and the resultant danger or apprehension must be very grave, substantial and weighty.*

(vii) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.

(viii) The conduct must be much more than jealousy, selfishness, possessiveness,

which causes unhappiness and dissatisfaction and emotional upset may not be a ground for grant of divorce on the ground of mental cruelty.

(ix) ***Mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day to day life would not be adequate for grant of divorce on the ground of mental cruelty.***

(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill-conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behavior of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

(xi) If a husband submits himself for an operation of sterilization without medical reasons and without the consent or knowledge of his wife and similarly if the wife undergoes vasectomy or abortion without medical reason or without the consent or knowledge of her husband, such an act of the spouse may lead to mental cruelty.

(xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.

(xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.

(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty."

32. Examining pleadings in present case, we do not find that assertions in the plaint do satisfy pleadings needed for a case of divorce founded on cruelty and that being so, evidence also has not been led to prove cruelty, hence, Trial Court has rightly held that plaintiff-appellant has failed to prove cruelty. Therefore, question-1 answered against plaintiff.

33. Now, coming to question-2. We find that basically plaint is founded on pleadings that marriage has become irretrievable. Both are living separately for the last one year and, therefore, divorce must be granted. Unfortunately, under Section 13 of Act, 1955, divorce is not permitted on the ground that marriage has become irretrievable.

34. The issue relating to irretrievable break down of marriage has been considered by a Division Bench of this Court in **First Appeal No. 525 of 2006 (Smt. Kavita Sharma Vs. Neeraj Sharma) decided on 7.2.2018**, wherein it has been observed as follows in paragraph 28:-

"28. The above findings recorded by Court below could not be shown perverse or contrary to record. Having considered the fact that parties are living separately from decades, we are also of the view that marriage between two is irretrievable and has broken down completely. Irretrievable breakdown of marriage is not a ground for divorce under Act, 1955. But, where marriage is beyond repair on account of bitterness created by the acts of the

husband or the wife or of both, Courts have always taken irretrievable breakdown of marriage as a very weighty circumstance amongst others necessitating severance of marital tie. A marriage which is dead for all purposes cannot be revived by the Court's verdict, if the parties are not willing. This is because marriage involves human sentiments and emotions and if they are dried-up there is hardly any chance of their springing back to life on account of artificial reunion created by the Court's decree. On the ground of irretrievable marriage, Courts have allowed decree of divorce and reference may be made to Naveen Kohli v. Neelu Kohli (2006) 4 SCC 558 and Rishikesh Sharma Vs. Saroj Sharma, 2006(12) SCALE 282. It is also noteworthy that in Naveen Kohli v. Neelu Kohli (supra) Court made recommendation to Union of India that Act, 1955 be amended to incorporate irretrievable breakdown of marriage as a ground for grant of divorce. "

35. Similarly this Court in **First Appeal No. 792 of 2008 (Ashwani Kumar Kohli Vs. Smt. Anita**) decided on 17.11.2016 has also considered this question and observed as follows in paragraphs 7, 8, 10, 11, 12 and 13:-

"7. Therefore, point for adjudication in this appeal is "whether a decree of reversal can be passed by granting divorce to the appellant on the ground which was not subject matter of adjudication before the Court below and is being raised for the first time in appeal".

8. Under the provisions of Act, 1955 there is no ground like any "irretrievable breakdown of marriage", justifying divorce. It is a doctrine laid down by judicial precedents, in particular, Supreme Court in exercise of powers under Article 142 of the Constitution has granted decree of divorce on the ground of irretrievable breakdown of marriage.

10. This aspect has been considered by this Court in Ram Babu Babeley Vs. Smt. Sandhya AIR 2006 (All) 12 = 2006 AWC 183 and it has laid down certain inferences from various authorities of Supreme Court, which read as under:-

"(i) The irretrievable break down of marriage is not a ground for divorce by itself. But while scrutinizing the evidence on record to determine whether the grounds on which divorce is sought are made out, this circumstance can be taken into consideration as laid down by Hon'ble Apex Court in the case of Savitri Pandey v. prem Chand Pandey, (2002) 2 SCC 73 and V. Bhagat versus D. Bhagat, AIR 1994 SC 710.

(ii) No divorce can be granted on the ground of irretrievable break down of marriage if the party seeking divorce on this ground is himself or herself at fault for the above break down as laid down in the case of Chetan Dass Versus Kamla Devi, AIR 2001 SC 1709, Savitri Pandey v. prem Chand Pandey, (2002) 2 SCC 73 and Shyam Sunder Kohli v. Sushma Kohli, (2004) 7 SCC 747.

(iii) The decree of divorce on the ground that the marriage had been irretrievably broken down can be granted in those cases where both the parties have levelled such allegations against each other that the marriage appears to be practically dead and the parties can not live together as laid down in Chandra Kala Trivedi versus Dr. SP Trivedi, (1993) 4 SCC 232.

(iv)The decree of divorce on the ground that the marriage had been irretrievably broken down can be granted in those cases also where the conduct or averments of one party have been so much painful for the other party (who is not at

fault) that he cannot be expected to live with the offending party as laid down in the cases of V. Bhagat versus D. Bhagat, (supra), Ramesh Chander versus Savitri, (1995) 2 SCC 7, Ashok Hurra versus Rupa Bipin Zaveri, 1997(3) AWC 1843 (SC), 1997(3) A.W.C. 1843(SC) and A. Jayachandra versus Aneel Kaur, (2005) 2 SCC 22.

(v) The power to grant divorce on the ground of irretrievable break down of marriage should be exercised with much care and caution in exceptional circumstances only in the interest of both the parties, as observed by Hon'ble Apex Court at paragraph No. 21 of the judgment in the case of V. Bhagat and Mrs. D. Bhagat, AIR (supra) and at para 12 in the case of Shyam Sunder Kohli versus Sushma Kohli, (supra)."

11. The above authorities have been followed by this Court in "Pradeep Kumar Vs. Smt. Vijay Lakshmi' in 2015 (4) ALJ 667 wherein one of us (Hon'ble Sudhir Agarwal,J.) was a member of the Bench.

12. In Vishnu Dutt Sharma Vs. Manju Sharma, (2009) 6 SCC 379, it was held that under Section 13 of Act 1955 there is no ground of irretrievable breakdown of marriage for granting decree of divorce. Court said that it cannot add such a ground to Section 13, as that would amount to amendment of Act, which is the function of legislature. It also referred to some judgments of Supreme Court in which dissolution of marriage was allowed on the ground of irretrievable breakdown but held that those judgments do not lay down any precedent. Supreme Court very categorically observed as under:-

"If we grant divorce on the ground of irretrievable breakdown, then we shall by judicial verdict be adding a clause to Section 13 of the Act to the effect that irretrievable breakdown of marriage is also a ground for divorce. In our opinion, this can only be done by the legislature and not by the Court. It is for the Parliament to enact or amend the law and not for the Court. Hence, we do not find force in the submission of learned counsel for the appellant."

13. The above view has been followed in Darshan Gupta Vs. Radhika Gupta (2013) 9 SCC 1. Similar view was expressed in 'Gurubux Singh Vs. Harminder Kaur' (2010) 14 SCC 301. This Court also has followed the above view in Shailesh Kumari Vs. Amod Kumar Sachan 2016 (115) ALR 689."

36. In **Chetan Dass v. Kamla Devi, (2001) 4 SCC 250**, Court observed that matrimonial matters relates to delicate human and emotional relationship. It demands mutual trust, regard, respect, love and affection with sufficient play for reasonable adjustments with spouse. The relationship has to conform to the social norms as well. There is no scope of applying the concept of "irretrievably broken marriage" as a straitjacket formula for grant of relief of divorce but it has to be considered in the backdrop of facts and circumstances of the case concerned.

37. In this regard, we may notice a recent authority of Supreme Court in **Civil Appeal No.4696 of 2013, R. Srinivas Kumar Vs. R. Shametha,** decided on 04.10.2019, wherein Court has observed that once marriage has broken down beyond repair, it would be unrealistic for the law not to take notice of that fact, and it would be harmful to Society and injurious to the interest of the parties where marriage becomes a fiction, though supported by a legal tie. By refusing to sever that tie, the law in such case, would not serve the sanctity of marriage and it would show

feelings and emotions of the parties. However, aforesaid judgement shows that since the ground that marriage has broken down beyond repair or has become irretrievable is not one of the ground on which divorce can be granted under Section 13 of Act, 1955, therefore, Supreme Court has exercised power under Article 142 of Constitution of India which power is not vested in this Court. Hence, second point is also answered against appellant.

38. No other point has been argued.

39. Appeal lacks merit. Dismissed with costs.

(2021)06ILR A130
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.01.2020

BEFORE

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

First Appeal No. 355 of 2017

Smt. Poonam ...Appellant
Versus
Rajiv Bariyani ...Respondent

Counsel for the Appellant:
Sri Santosh Kumar Srivastava

Counsel for the Opp. Party:
Sri Harindra Prasad

A. Civil Law - Hindu Marriage Act, 1955 – Section 13-B – Family Courts Act, 1984 – Section 19 – Matrimonial dispute – Divorce petition by mutual consent – Consent subsequently withdrawn by one party, effect thereof – There is nothing in Section 13-B of the Act which may indicate that the consent once given by either of the parties to a petition for divorce by mutual consent, cannot be withdrawn before a decree of divorce by mutual consent is passed – Held, when the consent by one of the parties is withdrawn, the Court cannot pass a decree of divorce by mutual consent – Order of the Court below affirmed. (Para 10 and 13)

First Appeal dismissed. (E-1)

Cases relied on :-

1. Smt. Sureshta Devi Vs Om Prakash reported in (1991) 2 SCC 25

2. Smruti Pahariya Vs Sanjay Pahariya, reported in (2009) 13 SCC 338

(Delivered by Hon'ble Bala Krishna Narayana, J. & Hon'ble Shamim Ahmed, J.)

1. Heard learned counsel for the appellant and Sri Harindra Prasad, learned counsel for the sole respondent.

2. This first appeal has been filed by the appellant Smt. Poonam against the judgement and order dated 28.1.2017 passed by Family Court, Gorakhpur, by which Case No. 458 of 2014 (Rajiv Bariyani vs. Smt. Poonam) under Section 13-B of Hindu Marriage Act, 1955 (hereinafter referred to as the "Act"), has been dismissed on the ground that the respondent Rajiv Bariyani has withdrawn his consent.

3. It is contended by learned counsel for the appellant that since the parties have been living separately for the past seven years and the respondent, after giving his consent to divorce by mutual consent, had withdrawn the same after two and a half years, the Family Judge was not at all legally justified in dismissing the Case No. 458 of 2014 (Rajiv Bariyani vs. Smt. Poonam).

4. Per contra, Sri Harindra Prasad, learned counsel for the sole respondent by

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

5. We have heard learned counsel for the parties.

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

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

Section 13B in The Hindu Marriage Act, 1955

13B. Divorce by mutual consent

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

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

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

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

10. There is nothing in Section 13-B of the Act which may indicate that the

consent once given by either of the parties to a petition for divorce by mutual consent, cannot be withdrawn before a decree of divorce by mutual consent is passed.

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

*"**9**. The `living separately' for a period of one year should be immediately preceding the presentation of the petition. It is necessary that immediately preceding the presentation of petition, the parties must have been living separately. The expression `living separately', connotes to our mind not living like husband and wife. It has no reference to the place of living. The parties may live under the same roof by force of circumstances, and yet they may not be living as husband and wife. The parties may be living in different houses and yet they could live as husband and wife. What seems to be necessary is that they have no desire to perform marital obligations and with that mental attitude they have been living separately for a period of one year immediately preceding the presentation of the petition. The second requirement that they `have not been able to live together' seems to indicate the concept of broken down marriage and it would not be possible to reconcile themselves. The third requirement is that they have mutually agreed that the marriage should be dissolved.*

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

***13.** From the analysis of the Section, it will be apparent that the filing of the petition with mutual consent does not authorise the court to make a decree for divorce. There is a period of waiting from 6 to 18 months. This interregnum was obviously intended to give time and opportunity to the parties to reflect on their move and seek advice from relations and friends. In this transitional period one of the parties may have a second thought and change the mind not to proceed with the petition. The spouse may not be party to the joint motion under sub-section (2). There is nothing in the Section which prevents such course. The Section does not provide that if there is a change of mind it should not be by one party alone, but by both. The High Courts of Bombay and Delhi have proceeded on the ground that the crucial time for giving mutual consent for divorce is the time of filing the petition and not the time when they subsequently move for divorce decree. This approach appears to be untenable. At the time of the petition by mutual consent, the parties are not unaware that their petition does not by itself snap marital ties. They know that they have to take a further step to snap marital ties. Sub- section (2) of Section 13-B is clear on this point. It provides that "on the motion of both the parties .... if the*

petition is not withdrawn in the meantime, the Court shall pass a decree of divorce What is significant in this provision is that there should also be mutual consent when they move the court with a request to pass a decree of divorce. Secondly, the Court shall be satisfied about the bonafides and the consent of the parties. If there is no mutual consent at the time of the enquiry, the court gets no jurisdiction to make a decree for divorce. If the view is otherwise, the Court could make an enquiry and pass a divorce decree even at the instance of one of the parties and against the consent of the other. Such a decree cannot be regarded as decree by mutual consent.

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

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

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

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

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

13. Thus, in view of the ratio laid down in the case of ***Smt. Sureshta Devi (supra)***, we do not find that the Court below committed any illegality or legal infirmity in holding that consent given in a divorce by mutual consent can be withdrawn by one of the parties before a Court grants a decree of divorce by mutual consent and when the consent by one of the parties is withdrawn, the Court cannot pass a decree of divorce by mutual consent. Since in this case the respondent has withdrawn his consent before the passing of a decree of divorce by mutual consent, we do not find that the Court below committed any error in dismissing the Case No. 458 of 2014 (Rajiv Bariyani vs. Smt. Poonam).

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

(2021)06ILR A134
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.03.2019

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.

First Appeal 381 of 2018

Sresth Singh & Anr. ...Appellants
Versus
Virendra Kumar Singh & Ors. ...Respondents

Counsel for the Appellant:
Sri Vinay Kumar Khare, Sri Sharvesh Kumar Pandey

Counsel for the Respondents:
Sri Vinod Singh

A. Civil Procedure Code,1908 – O. XXI R. 97 and 11 – Decree on the basis of compromise – Execution of decree – Obstructions caused severally – Gross abuse of process of Court – Exemplary cost, when can be imposed – Successive objections by the father, then by the mother, and thereafter by the son and daughter to obstruct the execution, which were rejected up to High Court – Held, while rejecting the objection the Court below lawfully recorded a finding of abuse of process of Court for moving the application malafidely under Order XXI Rules 97 and 101 C.P.C. so as to frustrate the execution of decree – Exemplary cost imposed on the appellants. (Para 10, 12 and 13)

First Appeal dismissed. (E-1)

Cases relied on :-

1. Punjab State Power Corporation Ltd. Vs Atma Singh Grewal; (2014) 13 SCC 666

2. Dnyandeo Sabaji Naik Vs Pradnya Prakash Khadekar; (2017) 5 SCC 496

3. Haryana State Co-op. L&C Federation Ltd. Vs Unique Co-op. L&C Co-op. Society Ltd.; (2018) 14 SCC 248

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

1. Heard Sri Sharvesh Kumar Pandey holding brief of Sri Vinay Kumar Khare, learned counsel for the objector/appellants and Sri Vinod Singh, learned counsel for decree holder/respondent No.1.

2. Learned counsel for the objector/appellants submits as under:-

(i) Execution Application being Execution Case No.1 of 2012 was not maintainable since there was no decree for eviction of the objector-appellants herein.

(ii) Appellants are occupying the disputed portion of the house since their birth.

(iii) Appellants have inherited the property as a Joint Hindu Property, as they are grand children of Shobha Singh who has three sons, namely, Virendra Singh, Amit Singh and Anil Kumar Singh. The appellants are son and daughter of Amit Singh.

(iv) A suit for permanent injunction being Original Suit No.136 of 2000 (Anil Kumar Singh Vs. Shobha Singh and others) was filed in which a compromise decree was passed on 28.08.2003 whereby each son of Shobha Singh, namely, Virendra Singh, Amit Singh and Anil Kumar Singh (Adopted son) each were given 1/3rd share. At the time of aforesaid decree the appellants were minor. They were not party to the compromise decree. Therefore, they lawfully filed objection in Execution Case No.1 of 2012 under Order XXI Rule 97 and

101 C.P.C. but court below has arbitrarily rejected it.

3. Sri Vinod Singh, learned counsel for respondent No.1 supports the impugned order. He submits that firstly, father of the appellants filed various applications /objections and after being unsuccessful he had set up his wife and when she also became unsuccessful then he has set up his son and daughter, who are appellants herein. He referred to order dated 25.09.2012 in Writ-C No.48402 of 2012 (Amit Kumar Singh Vs. State of U.P. and others), order dated 13.01.2014 in Writ-C No.811 of 2014 (Amit Kumar Singh Vs. Shobha Singh and 3 others) and order dated 11.08.2016 in First Appeal No.739 of 2013 (Smt. Pooja Vs. Virendra Kumar Singh and 4 others).

4. I have carefully considered the submissions of learned counsel for the parties and with their consent this appeal is being finally heard.

FACTS

5. Briefly stated facts of the present case are that the appellants have objected to the execution of the decree of the disputed house situate at Rajendra Nagar, Kasba Orai, District Jalaun. The land of this house was purchased by the grand father of the appellants, namely, Sri Shobha Singh son of Mukund Singh by registered sale deed dated 12.04.1944. In the year 1975 he took loan of Rs.40,000/- from Orai Sahkari Grih Nirman Samiti 470, Rajendra Nagar, Orai, for construction of the house over the aforesaid land purchased by him. He repaid the housing loan taken by him. The aforesaid Shobha Singh had huge immovable properties. He had three sons, namely, Anil Kumar Singh, Virendra Kumar Singh, and Amit Kumar Singh. His aforesaid son, Anil Kumar Singh filed injunction suit being O.S. No.136 of 2000 (Anil Kumar Singh Vs. Shobha Singh, Smt. Shushila Devi wife of Shobha Singh, Virendra Kumar Singh and Amit Kumar Singh) for permanent injunction with respect to the disputed house. In the said suit, a compromise dated 11.08.2003 signed by all the parties to the suit was jointly filed and after verification the compromise was accepted by the Court on 13.08.2003 and the decree dated 28.08.2003 was passed in terms of the compromise.

6. Thereafter Shobha Singh filed an Execution Case No.61 of 2008 (Shobha Singh Vs. Anil Kumar Singh) for execution of the decree. In the execution case, **Amit Kumar Singh** filed an objection to the application 31-Ga 2 dated 21.05.2012 (Annexure No.7 to the Civil Misc. Writ Petition No.811 of 2014) Amit Kumar Singh Vs. Shobha Singh and others and in paragraph 2 thereof he stated that "शोभा सिंह ने विवादित मकान को ऋण लेकर निर्माण कराया था जिसके लिए रिकवरी हेतु कार्यवाही की गयी है, और शोभा सिंह ने विवादित मकान की नीलामी से बचाने हेतु व ऋण वसूली की कार्यवाही होने पाने हेतू माननीय उच्च न्यायालय में रिट संख्या 44622 सन् 2009 शोभा सिंह बनाम स्टेट आफ यू0पी0 आदि प्रस्तुत की है जो कि विचाराधीन है।"

7. It appears that prior to the said objection, **the father of the appellants herein**, namely, **Amit Kumar Singh filed a Misc. Case No.1 of 2009** under Section 151 C.P.C. for setting aside the compromise decree dated 13.08.2003 /28.08.2003 on the ground that although Anil Kumar Singh is the natural son of Shobha Singh but he was adopted by Ranbir Singh and therefore, Anil Kumar Singh had no right in the property of Shobha Singh. **This application being Misc. Case No.01 of 2009 (Amit Kumar Singh Vs. Anil Kumar Singh and others)**

was rejected by the court of Additional District Judge, Jalaun at Orai by order dated 27.08.2012. Against that order, father of the appellants herein, namely, **Sri Amit Kumar Singh filed Writ-C No.48402 of 2012 which was dismissed by this Court by order dated 25.09.2012**, as under:

"Challenging the said order only submission advanced is that at the time of passing of the compromise decree petitioner had no knowledge that respondent no. 2 was given in adoption. The compromise is not disputed. It has been signed by the petitioner. A decree on the basis of the compromise has been passed in his presence and upon hearing the petitioner. Therefore, the said order decreeing the suit no. 136 of 2000 on the basis of compromise can not be recalled."

8. Thereafter, the aforesaid **Amit Kumar Singh (father of the appellants herein) filed another Misc. Case No.2 of 2009** (Amit Kumar Singh Vs. Shobha Singh and others) under Section 47 C.P.C. **This Misc. Case No.2 of 2009 was dismissed** by the Court of Additional District Judge, Jalaun at Orai by order dated 19.03.2013. **He again filed an Misc. Case No.10 of 2003 (Amit Kumar Singh Vs. Shobha Singh and others) under Section 47 C.P.C. which was rejected** by the court of Additional District Judge, Orai by order dated 24.05.2013. **He again filed an application 25-Ga 2 in the aforesaid Misc. Case No.10 of 2003 (Amit Kumar Singh Vs. Shobha Singh) which was rejected** by the court of Additional District Judge, Orai by order dated 06.07.2013. **Again an application 3-Ga 2 was filed by the aforesaid Amit Kumar Singh which was rejected by the court below by order dated 30.09.2013**. In the mean time, another son of Shobha Singh, namely, **Virendra Kumar Singh filed an Execution Case No.01 of 2012 in which Amit Kumar Singh, the father of the appellants herein, filed an application 27-Ga 2 which was rejected by the court below by order dated 21.10.2013. All these orders were challenged by Amit Kumar Singh, the father of the appellants herein in Writ Petition No.811 of 2014 which was dismissed** by this Court by order dated 13.01.2014.

9. After the father of the appellants herein, namely, Amit Kumar Singh could not succeed to obstruct the execution of the decree passed in O.S. No.136 of 2000, **then his wife Smt. Pooja Singh (mother of the appellants herein) as a third party filed an application 21-Ka in Execution Case No.1 of 2012 which was rejected by** the court of Additional District Judge, Court No.5, Jalaun at Orai by order dated **13.09.2013 observing that the application is abuse of process of Court. Against this order, the mother of the appellants herein, namely, Smt. Pooja Singh filed First Appeal No.739 of 2013** in which a counter affidavit dated 15.02.2014 was filed by grand father of the appellants herein, namely, Sri Shobha Singh. In the counter affidavit Shobha Singh denied every allegations made by the mother of the appellants herein. Shobha Singh mentioned **in paragraph 20 of his counter affidavit that mother of the appellants Smt. Pooja Singh has also filed an injunction suit in O.S. No.257 of 2013 in the court of Civil Judge (Senior Division), Jalaun at Orai in which 7-C application has been rejected by a detailed order dated 30.10.2013** passed by the Civil Judge (Senior Division). The aforesaid **First Appeal No.739 of 2013 was dismissed** by this Court by judgment dated 11.08.2016.

10. **Thus, after the mother and the father of the appellants herein, namely, Amit Kumar Singh and Smt. Pooja Singh were unsuccessful to obstruct the execution of decree passed in August, 2003, then they have set up their son and daughter (appellants herein) who filed a Misc. Case No.58 of 2017** (Km. Aishwarya Singh and another Vs. Virendra Singh and others) under Order XXI Rules 97 and 101 C.P.C. objecting the execution of decree of O.S. No.136 of 2000. The application No.20-Ga 2 and 3-Ka 1 filed by the appellants herein mainly on the ground that they being co-parcener have a right in the disputed property and therefore, the decree cannot be executed against them were rejected by the court of Additional District Judge/Special Judge (SC/ST Act) Jalaun at Orai by two separate orders both dated 26.02.2018. **Aggrieved with these orders dated 26.02.2018, the appellants herein have filed the present appeal under Section 96 C.P.C.**

11. Facts of the case as briefly noted above leaves no manner of doubt that as per own case and also as established by documentary evidences on record, the grand father of the appellants herein, namely, **Shobha Singh purchased the land of the disputed house by registered sale deed on 02.04.1944 and he got constructed the disputed house in the year 1975** by taking loan from Orai Sahkari Grih Nirman Samiti, Rajendra Nagar, Orai. He subsequently defaulted in repayment of housing loan, resulting in recovery proceedings against him which was challenged by him in Writ Petition No.44622 of 2019. It was admitted by the father of the appellants herein in his objection to the application 31-Ga 2 in Execution Case No.61 of 2008, Annexure No.7 to the Writ Petition No.811 of 2014 (Amit Kumar Singh Vs. Shobha Singh and another). **Thus, the disputed property is the self acquired property of Shobha Singh which is subject matter of the compromise decree dated 25.08.2003 in O.S. No.136 of 2000.**

12. The facts of the case as noted above clearly establish **gross abuse of process of Court by Amit Kumar Singh**, his wife Pooja Singh and now by their son and daughter who are appellants herein. In the impugned order dated 26.02.2018 the court below while rejecting the application of the appellants herein, briefly discussed the facts and lawfully recorded a finding of abuse of process of Court by the appellants by moving the application 3-Ka 1 malafidely under Order XXI Rules 97 and 101 C.P.C. so as to frustrate the execution of decree which has been rejected by the impugned order.

13. In the light of the facts of the case as briefly discussed above, I do not find any infirmity or perversity in findings recorded by the court below in the impugned order. The abuse of process of Court by the appellants is well evident on record. Therefore, exemplary cost is necessary to be imposed on the appellants herein for filing this frivolous appeal and abusing the process of Court, in view of the law laid down by Hon'ble Supreme Court in **Punjab State Power Corporation Ltd. Vs. Atma Singh Grewal (2014) 13 SCC 666 (para 14) and Dnyandeo Sabaji Naik Vs. Pradnya Prakash Khadekar (2017) 5 SCC 496 (paras 9 to 14).**

14. In **Dnyandeo Sabaji Naik (supra)**, Hon'ble Supreme Court has observed that it is not merely a matter of discretion but a duty and obligation cast upon all courts to ensure that the legal

system is not exploited by those who use the forum of the law to defeat or delay justice. Hon'ble Supreme Court commended all courts to deal with frivolous filings, firmly and impose exemplary costs.

15. The principles laid down in the case of **Dnyandeo Sabaji Naik (supra)**, have been reiterated by Hon'ble Supreme Court in the case of **Haryana State Co-op. L&C Federation Ltd. vs. Unique Co-op. L&C Co-op. Society Ltd., (2018) 14 SCC 248** (Paras 16 & 17) while dismissing the appeal of the Haryana State Coop. L&C Federation Ltd. (supra) with exemplary cost of Rs.5 lacs.

16. In the case of **Punjab State Power Corporation Ltd**. (supra), Hon'ble Supreme Court emphasised that imposition of exemplary costs should be in real terms and not merely symbolic.

17. Facts of the case and the findings recorded in paras 5 to 13 above leave no manner of doubt that the process of Court has been grossly abused by the appellants. This Court must view with dis-favour the attempt of litigants to abuse judicial process and must deal with them firmly otherwise sanctity of judicial process shall be seriously eroded. In such cases consequences must follow so that unscrupulous to the detriment of the legitimate may not misuse the process of dispensing justice. The tendency of repeated attempt to revive a stale issue, needs to be curbed by Courts firmly by imposing real time costs. It is necessary to do so, so that on one hand access to Courts may be available to people with genuine grievances and on the other hand frivolous and groundless filing of cases constituting serious menace to the administration of justice and consuming precious time of Court and clogging the infrastructure, may be discouraged and productive resources may be deployed in handling genuine cases.

18. For all the reasons aforestated, the appeal is **dismissed** with cost of Rs.1,00,000/-.

19. The cost shall be deposited by the appellants with the court below within two months and on deposit the respondent Nos.1, 2 and 3 shall be entitled to withdraw it in equal proportion.

(2021)06ILR A138
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.07.2019

BEFORE

THE HON'BLE MANOJ MISRA, J.
THE HON'BLE VIRENDRA KUMAR SRIVASTAVA, J.

First Appeal No. 525 of 2019

Shri Om Tiwari ...Appellant
Versus
Smt. Shikha Tiwari ...Respondent

Counsel for the Appellant:
Sri B.D. Shukla

Counsel for the Respondent:
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A. Civil Law - Hindu Marriage Act, 1955 – Sections 13 & 25 – Family Courts Act, 1984 – Section 10 – Divorce petition – Permanent Alimony, claimed – No pleading in written statement on the issue of alimony – However, the Court framed an addition issue on it – Validity – Application to strike of additional issue, filed – Held, mere framing of an issue does not cause prejudice to any party, rather it

enables a party to appropriately address the issue and to lead evidence so that the court could arrive at the truth – Framing of such an issue by a Family Court is within its power conferred upon it by Section 10(3) of the Family Courts Act. (Para 11)

B. Practice and procedure – Family Courts Act, 1984 – Section 10 – Divorce petition – Determination of procedure – Power of Family Court – Sub-section (3) of Section 10 of the Act enables a Family Court to determine its own procedure with a view to arrive at a settlement in respect of the subject matter of the suit or proceedings or at the truth of the facts alleged by the one party and denied by the other. (Para 8)

First Appeal dismissed. (E-1)

(Delivered by Hon'ble Manoj Misra, J. & Hon'ble Virendra Kumar Srivastava, J.)

1. We have heard Sri B.D. Shukla for the appellant and have perused the record.

2. The instant appeal has been filed under Section 19 of the Family Courts Act, 1984 challenging the orders dated 02.05.2019 and 02.04.2019 passed by the Additional Principal Judge, Family Court, Court No.2, Kanpur Nagar in Matrimonial Case No.1026 of 2008 filed under Section 13 of the Hindu Marriage Act, 1955.

3. By order dated 02.04.2019, on application of defendant-respondent, an additional issue was framed, that is, "whether the defendant is entitled to permanent alimony".

4. By order dated 02.05.2019, the Application 73-Ga filed by the plaintiff-appellant to strike off the aforesaid issue was rejected.

5. Assailing the orders dated 02.04.2019 and 02.05.2019, the learned counsel for the appellant has urged that the issue relating to entitlement for permanent alimony does not arise from the pleadings of the parties and is to be considered at the time of final decision of the case and, therefore, the same should not be made an issue for adjudication at this stage. He has invited attention of the Court to sub-section (1) of Section 10 of the Family Courts Act, 1894 which provides that subject to the other provisions of the Act and the rules, the provisions of the Code of Civil Procedure, 1908 and of any other law for the time being in force shall apply to the suits and proceedings [other than the proceedings under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974)] before a Family Court and for the purposes of the said provisions of the Code, a Family Court shall be deemed to be a civil court and shall have all the powers of such court.

6. It has been urged that since the issues are to be determined on the basis of the pleadings of the parties, in absence of any pleading in the written statement with regard to permanent alimony, framing additional issue in that regard is not legally justified and, therefore, the court below was not justified in rejecting the application filed by the appellant to strike off the additional issue.

7. We have perused the provisions of the Family Courts Act, 1984 (for short the Act). Sub-section (3) of Section 10 of the Act is of relevance. Sub-section (3) of Section 10 of the Act provides as follows:-

"(3) Nothing in sub-section (1) or sub-section (2) shall prevent a Family Court from laying down its own procedure with a view to arrive at a settlement in respect of the subject-matter of the suit or proceedings or at the truth of the facts alleged by the one party and denied by the other."

8. As noticed above, sub-section (3) of Section 10 of the Act enables a Family Court to determine its own procedure with a view to arrive at a settlement in respect of the subject matter of the suit or proceedings or at the truth of the facts alleged by the one party and denied by the other. This power is notwithstanding the provisions contained in sub-sections (1) and (2) of Section 10.

9. As per Section 25 of the Hindu Marriage Act, 1955, the prayer for permanent alimony is to be accorded consideration by the Court at the time of passing any decree or at any time subsequent thereto, on application made to it for the purpose by either the wife or the husband, as the case may be. There is nothing in Section 25 of the Hindu Marriage Act, 1955 which may suggest that an application for permanent alimony cannot be filed during the suit proceeding. Though, once filed, it is to be addressed at the time of passing the decree or at any time subsequent thereto. Therefore, if any such application is filed, framing an issue in that regard is not prohibited. Though, such issue would have to be addressed at the time of final decision of the petition. Thus, if any such issue has been framed in a divorce petition, it is expected that the Family Court would decide the same at the time of deciding the petition or any time thereafter.

10. In the instant case, the defendant-respondent had filed an application under Section 25 of the Hindu Marriage Act for permanent alimony. Under the circumstances, on her application, that additional issue was framed.

11. As mere framing of an issue does not cause prejudice to any party, rather it enables a party to appropriately address the issue and to lead evidence so that the court could arrive at the truth and appropriately settle the matter, we are of the view that framing such an issue by a Family Court is within its power conferred upon it by sub-section (3) of Section 10 of the Family Courts Act.

12. For the reasons recorded above, we do not find any merit in the submission made by learned counsel for the appellant. The appeal is **dismissed**.

(2021)06ILR A140
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.03.2021

BEFORE

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

First Appeal 815 of 2017

Deepak ...Appellant
Versus
Smt. Radha Rani ...Respondent

Counsel for the Appellant:
Sri Anurag Sharma

Counsel for the Respondents:

A. Civil Law - Hindu Marriage Act, 1955 – Section 9 – Matrimonial dispute – Conjugal right, claimed – Cruelty – Acquittal in criminal litigation, it's effect – Irretrievable break down – Mediation between the parties failed – Held, If criminal litigations are filed and if they culminate into acquittal then it amounts to cruelty – Wedlock come to irretrievable breakdown as the parties are leaving separately since 2015. (Para 18 and 19)

First Appeal allowed. (E-1)

Cases relied on :-

1. Vidhyadhar Vs Manikrao; AIR 1999 SC page 1441

2. K. Srinivas Vs K. Sunita; 2014 0 Supreme (SC) 819

3. Rani Narsimha Sastry Vs Rani Suneela Rani; 2019 0 Supreme (SC) 1301

4. Mangayakarasi Vs M. Yuvaraj; 2020 0 Supreme (SC) 221

5. Ravindra Pyarelal Vidlan & ors. Vs St. of Mah.; 1993 CrLJ 3019

6. K. Srinivas Vs K. Sunita; (2014) 16 SCC 34

7. Civil Appeal No. 8871 of 2019; Rani Narsimha Sastry Vs Rani Suneela Rani, decided by Supreme Court on 19.11.2019

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

1. We had reserved the Judgment and kept it for pronouncement on 8th March 2021 but as the advocates were on strike, we did not pronounce the Judgment on that day. We have kept the matter for pronouncement today as it was made to understand that the strike would be called off today.

2. Heard Sri Anurag Sharma for the appellant.

3. By way of this appeal, the appellant has felt aggrieved by the judgment and order dated 25.9.2017 passed by Additional Principal Judge, Family Court, Meerut, where he had instituted a Suit, being Case No.544 of 2015, for dissolution of his marriage with the respondent.

4. The factual scenario as it goes to be divulged before the learned Family Court Judge is that the appellant/ applicant herein, who shall be referred to as "the appellant" and the respondent would be herein after referred to as "the opponent" as they appear before the subordinate court.

5. The appellant got married with the respondent on 10.12.2009 and on 25.10.2010 they were blessed with the son, who is now 11 year of age and is in the custody of the defendant. Most unfortunately on 7.5.2012, the opponent herein complained against the appellant that he had perpetrated cruelty and had demanded dowry and that is how he and his parents had committed an offence under Section 498 of the I.P. Code.

6. After waiting for 3 years, the appellant herein filed a petition for desolation and harassment. The said matter was filed on 20.4.2015. Despite service of notice, the opponent did not appear. The appellant adduced documentary evidence and filed his own Affidavit which came to be numbered as 27 ka. His evidence and examination-in-chief was in the form of an Affidavit. Most unfortunately on 25.9.2017, the learned Judge dismissed the matter.

7. In the petition, it was averred that both the parties belong to a profess Hindu religion and their marriage was solemnized as per Hindu Rites and Ritual on 10.12.2009. It is averred that no dowry was offered by the opponent or taken by the appellant or his family members. This was the first marriage of the appellant. As far as the opponent is concerned, it was her first marriage. The averment in the petition filed before the Family Court went on to paint a picture whereby it was brought on record that it was the opponent, who was forcing the appellant to stay separate from his parents and she would use bad language. She would colour in the house and try to pressurize the appellant. It is alleged that

she has threatened the appellant that if he did not separate from his parents, she would file false cases against him.

8. The appellant further contended that it was the father and the daughter, who pressurized him for staying separate from his parents which he was not willing to do. He even succumbed to pressure and started staying separately. The appellant was serving as a salesman with Mukesh Jain Jewellers Private Limited and his time of service was 09.30 a.m. to 08.00 p.m.

9. The respondent did not state any pleadings in written statement is an admitted position of fact and avoided coming to the witness box so that she may be put to examination-in-chief or cross-examination. This itself is enough to come to the conclusion that the averments made in the Suit are unrebutted. A party must state his or her own case on oath and if that is done, a presumption would arise that the case set out by the petitioner or the plaintiff or the applicant as in our case is correct and that she had filed an application under Section 24 of the Hindu Marriage Act. A copy of Affidavit on her behalf on 26.5.2015 was also filed to which reply was filed by the present appellant herein.

10. The family court waited for 2 years and 2 months. The respondent absented herself thereafter. In our case, therefore, a situation is akined to the decisions passed by the various High Courts and Privy Council in the case of **Vidhyadhar Vs. Manikrao, AIR 1999 SC page 1441** and also in **Sardar Gurbaksh Singh Vs. Gurdial Singh and another**. This was followed by the **Lahore High Court in Kripa Singh Vs. Ajaipal Singh and others, AIR (1930) Lahore 1** and the Bombay High Court in **Martland Pandharinath Chaudhari Vs. Radhabai Krishnarao Deshmukh AIR (1931) Bombay 97**. The Madhya Pradesh High Court in **Gulla Kharagjit Carpenter Vs. Narsingh Nandkishore Rawat** also followed the Privy Council decision in **Sardar Gurbakhsh Singh's case (supra).** The Allahabad High Court in **Arjun Singh Vs. Virender Nath and another**, held that if a party abstains from entering the witness box, it would give rise to an inference adverse against him. Similarly a Division Bench of the Punjab & Haryana High Court in **Bhagwan Dass Vs. Bhishan Chand and others**, drew a presumption under Section 114 of the Evidence Act against a party who did not enter into the witness box.

11. The genesis of the application rather Suit which was filed for divorce was on the basis of the perpetrated cruelty by the wife.

12. Having considered the argument advanced and on perusal of the record, it is evident that the family court failed to consider the cruelty pleaded by the plaintiff-appellant in which the plaintiff's wife illegally lodged the criminal case under Sections 498A/323/504/506 of I.P.C. and ¾ Dowry Prohibition Act, Police Station - Lisadi Gate, Meerut, and in the aforesaid case the appellant as well as his father and mother were acquitted on merits vide judgment and order dated 1.2.2016 passed by the A.C.J.M. Ist, Meerut. The behaviour and action of the appellant's wife with her husband/appellant was not according to sacrament as per the Hindu Marriage Act. The public interest as well as social interest in the society demands not only that the married status should, as far as possible, and whenever possible, be maintained. The appellant tried his level

best to improve the relationship but the wife and her relative at every stage did not make any endeavour to settle marriage/relationship and did not do any act in welfare of the child.

13. It appears that the learned Family Court Judge has given much stress to deed of settlement dated 3.11.2014. The appellant herein had preferred a petition for divorce which was numbered as 39 of 2013 and respondent had filed an application for maintenance under Section 24 and on 3.11.2014 the said litigations were to be withdrawn as the party has decided to cohabit and the application under Section 498A came to be decided in favour of the appellant herein and the learned Judge dismissed the complaint vide order dated 1.2.2016.

14. The petitioner - appellant herein instituted a Suit for divorce in the year 2015. Pursuant to the earlier litigations, the parties started cohabiting on 6.11.2014. We may reconsider the factual data as it emerges after the settlement. The plaint divulges the fact that there was a marriage in the house of the younger sister of the respondent and the applicant had to withdraw the litigation on 14.3.2015 but the complaints were not withdrawn and it is alleged that the respondent committed breach of trust and did not withdraw the criminal proceedings. It was pleaded that the brother-in-law Sonu demanded Rs. 20,000/- on the marriage of his sister-in-law dated 22.3.2015. After about 8 - 10 days, the respondent and her sister demanded Rs. 15,000/- from the appellant and he refused to oblige them thereafter she re-started to harass them. The appellant was staying with his wife in a rented house. It is alleged that after the appellant left for his job, the respondent would go to her parental home and to meet with her boy friends and spends whole day with them. She forced the appellant to leave Meerut and was forcing him to move and take a job in Delhi, which would be arranged by her uncle. The appellant being the only child of his parents did not wish to leave Meerut and go to Delhi. It is stated that she had severed all relations the day the appellant withdrew the Suit for divorce. She had stopped cooking, she had stopped cohabiting. The appellant would cook himself before leaving and after coming back from the shop at night. The respondent would harass him mentally to such a level that he even tried to commit suicide but could not succeed. There are allegations in the plaint about the character of the lady.

15. The police refused to lodge the complaint which the appellant wanted to lodge against the respondent and on 14.4.2015 she summoned her parents and took all her belongings in a mini truck. It is stated in the plaint that the relations has become so strainedthat there is no chance of reconciliation between the parties, which has been recorded by the learned Judge that the conciliator also failed in his efforts to reconcile both the parties. The respondent stopped coming to the Court and, therefore, on 30.1.2017 the learned trial Judge decided her matter ex-parte. The appellant herein produced the following documents:-

(I) Application under Section 156 (3) of Cr.P.C. dated 7.5.2012.

(II) Petition under Section 13 of the Hindu Marriage Act dated 10.12.2009.

(III) Affidavit 27-Ka dated 2.3.2017.

(IV) Compromise Agreement dated 3.11.2014

16. The learned Judge framed the following 4 issues:-

(I) Whether the opposite party is leading an adulterous life with Varun Sharma?

(II) Whether Varun Sharma is a necessary party in the petition?

(III) Whether the opposite party has committed cruelty with the applicant?

(IV) Which relief, if any can be granted, the applicant is entitled to get?

which we are also supposed to answer.

17. The learned Counsel has relied on the following judgements:-

(I) K. Srinivas Vs. K. Sunita, 2014 0 Supreme (SC) 819;

(II) Rani Narsimha Sastry Vs. Rani Suneela Rani, 2019 0 Supreme (SC) 1301;

(III) Mangayakarasi Vs. M. Yuvaraj, 2020 0 Supreme (SC) 221.

18. We are convinced that the appellant has been treated with cruelty. The reasons are as follows. The appellant had preferred a petition for claiming conjugal rights under Section 9 of the Hindu Marriage Act. Unfortunately, the same came to be dismissed for non-prosecution but the fact that the respondent did not appear nor did she show any willingness to cohabit with the petitioner is also one of the grounds which can be said to be against the respondent. The Apex Court and the High Courts judgment relied upon by the learned Advocate for the appellant have categorically held that if criminal litigations are filed and if they culminate into acquittal then it amounts to cruelty.

19. May that as it may be after the settlement also the wife did not co-habit with the appellant is a matter of fact. Further, in that view of the matter, we allow this appeal. The wedlock is in our view if come to irretrievable breakdown as the parties are leaving separately since 2015. Unfortunately, the mediation between the parties failed. The respondent herein refused to even withdraw the criminal proceedings despite the fact that post mediation in the matrimonial petition no.39 of 2013. The parties cohabited for a short period of 25 days. It appears that even in the criminal complaint, the respondent who was examined as PW-1. She has conveyed to the Court that she wants what can be said to be divorce. She has stated "PARIVADINI DWARA 244 Cr.P.C. KE ESTER PAR KI GAI JIRAH ME KAHA GAYA HAI KI MERE PATI NE TALAK KA MUKADMA KIYA HUVA HAI. MAI USME UPASTHIT HUN. MAI BHI TALAK CHAHTI HUN. JIRAH ANTARGAT DHARA 246 Cr.P.C. ME BHI IS SACHHI DWARA KAHA GAYA KI YADI DEEPAK AAJ MUJHE LE JANA CHAHE TO MAI UNKE SATH JANE KE LIYE TAIYAR NAHI HUN. MAI USSE TALAK CHAHTI HUN."

20. The matter can also be looked into from one another aspect. The learned Judge has committed an error, which can be said to be an error apparent on the face of the record. We do not go into the premise of break down of marriage as it is still now recognized ground for granting divorce. The principles of Civil Procedure Code are applicable. The learned Judge did not place reliance on the Judgment of **Ravindra Pyarelal Vidlan and others Vs. State of Maharashtra, 1993 CrLJ 3019** wherein it has been held that if a party fails to bring home the charges under Section 498A, it would amount to cruelty. The learned Judge again did not place reliance on the statement of the wife, who in a deposition

in judicial proceedings, which is part of the record before the Family Court, has categorically mentioned that she also showed her desire to live separately from the appellant and bring an end to the marriage. Learned Judge has come to the conclusion that there was no cruelty perpetrated by the respondent rather he has come to the negative finding that cruelty was perpetrated by the husband. The evidence on record of the wife in other matters has been made the main basis for refusing grant of decree of divorce.

21. The matter had gone before the mediator where both the parties rather the appellant showed his desire to take the respondent back to the matrimonial home where also she has not showed any desire in continuing the marriage which showed that the learned Judge ought to have pressed into service the provisions of Order XII Rule 6 of the Code of Civil Procedure which are made applicable to the proceedings before the Family Courts. As, in our case, there is clear admission though not in the Form No. 10 of the Appendix, the admission of facts should have been taken into consideration while passing the judgment. The provisions of Order 12 Rule 6 reads as follows:-

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

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

22. Much emphasis has been placed on record by the Counsel for the appellant. The Hon'ble Supreme Court in the case of ***K. Srinivas Vs. K. Sunita reported in (2014) 16 SCC 34***, has held that the respondent wife filed a false criminal complaint resultant acquittal of husband and his family members, such complaint is sufficient to constitute matrimonial cruelty.

23. In an another matter, the Hon'ble Supreme Court in the case of ***Rani Narsimha Sastry Vs. Rani Suneela Rani, civil Appeal No.8871 of 2019, decided on 19.11.2019*** held that when a person undergoes a trial in which he is acquitted of the allegation of offence under Section 498A of IPC, levelled by the wife against the husband, it cannot be accepted that no cruelty has meted out to the husband.

24. In that view of the matter, the appeal is allowed. Unfortunately, as the wife is not before us we do not pass any orders for maintenance which she may raise under the law as/if permitted to her.

(2021)06ILR A145
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.01.2020

BEFORE

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

First Appeal No. 917 of 2019

Geeta Devi ...Appellant
Versus
Sushil Kumar Yadav ...Opp. Party

Counsel for the Appellant:
Sri Rajiv Kumar Mishra, Sri Radhey Shyam

Counsel for the Opp. Party:
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A. Civil Law - Hindu Marriage Act, 1955 – Sections 13 & 24 – Matrimonial dispute – Divorce – Expenses of proceeding, claimed – Quantum of interim maintenance, determination thereof – Principle laid down – Defendant-appellant is working as Headmistress in Primary School and getting regular salary – Held, having due regard to Section 24, the Court is required to take into consideration the income of the parties before deciding the quantum of the interim maintenance – The Court has to keep in view of the need of the applicant-defendant and paying capacity of the plaintiff-opposite party – Defendant-appellant can maintain herself and she can bear the expenses of litigation and therefore, she is not entitled for any relief under section 24. (Para 8, 10 and 14)

First Appeal dismissed. (E-1)

Cases relied on :-

1. Padmavathi Vs C. Lakshminarayana; AIR 2002 Kant 424

2. Neelam Kalia Vs Rajesh Kalia; AIR2013 HP 76

3. Captain Ramesh Chander Vs Veena Kaushal; AIR 1978 SC 1807

4. Manokaram Vs Devaki; AIR 2003 Mad 212

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

1. Heard learned counsel for the defendant-appellant and perused the impugned judgment and order.

2. This appeal is directed against the impugned judgment and order dated 21.11.2019 passed by the Principal Family Judge, Jaunpur, by which, the application-18ga moved by the defendant-appellant, under Section 24 of the Hindu Marriage Act, 1955 in Case No.943 of 2015 (Sushil Kumar Yadav Vs. Geeta Devi) has been rejected.

3. It is contended by the learned counsel for the defendant-appellant that the marriage of defendant-appellant was performed with plaintiff-opposite party on 27.11.2004 according to Hindu Rites and Rituals and after the marriage, both of them were living peacefully and from the aforesaid wed-lock, two daughters namely, Vishanavi and Pragati were born. It is further contended that prior to the marriage, both the parties were appointed on the post of assistant teacher and they were posted in different places.

4. It is further contended by the learned counsel for the defendant-appellant that the plaintiff/opposite party started treating the defendant-appellant with cruelty but the defendant-appellant kept mum and tried to negotiate the matter but plaintiff-opposite party did not pay any heed and threw the defendant-appellant out from his house, and thereafter, the defendant-appellant and her two minor daughters are living separately and the plaintiff-opposite party is not taking care and not paying any amount for their expenditure.

5. Learned counsel for the defendant-appellant further contended that the plaintiff-opposite party has filed a petition before the learned Trial Court, under Section 13 of the Hindu Marriage Act bearing Case No.943 of 2015 on 19.12.2015. Notices were issued and when the defendant-appellant got the information he was shocked by the conduct of the plaintiff-opposite party and she tried to

negotiate the matter but the plaintiff-opposite party did not pay any heed and refused to live jointly.

6. Learned counsel for the defendant-appellant further contended that the defendant-appellant's financial condition was not good, therefore, she filed an application under Section 24 of Hindu Marriage Act with the prayer that she is unable to maintain herself and her two daughters, therefore, she needs an interim maintenance for Rs.5,000/- per month for herself and Rs.5,000/- for filing written statement and Rs.500/- per month for conveyance charges to attend the Court.

7. Learned counsel for the defendant-appellant further contended that the plaintiff-opposite party filed his objection 19-Ga and submitted that the defendant-appellant is working as Headmistress in Primary School, Bara Deeh, Chhota Deeh, Gyanpur and after deduction she is getting a total sum of Rs.63,056/- per month and she has already filed an application, under Section 125 Cr.P.C, by which the Court below vide its order dated 28.11.2017 declined to pay any amount to the defendant-appellant and only directed to pay Rs.4,000/- per month to each of the daughters totalling to Rs.8,000/- per month for their maintenance. In the objection 19-ga, the plaintiff-opposite party further submitted that defendant-appellant from his income purchased a land on which a boundary wall was constructed, therefore, she is not in need to get any amount under Section 24 of the Hindu Marriage Act as prayed by her in application no.18ga. It is also mentioned in the application that the old parents are also living with the plaintiff-opposite party and he is bearing all expenses of their medicines and other requirements and prayed that the application 18-ga filed by the defendant-appellant under Section 24 of the Hindu Marriage Act may be dismissed.

8. Having heard learned counsel for the defendant-appellant and perused the impugned judgement and order dated 21.11.2019 as well as the other material brought on record, we find that the Court below after coming to the conclusion that the defendant-appellant is working as Headmistress in Primary School, Bara Deeh, Chhota Deeh, Gyanpur, District Bhadohi and getting regular salary and further the plaintiff-opposite party is paying Rs.4000/- each to the minor daughters for their maintenance vide order dated 28.11.2017 rejected the application filed under Section 125 Cr.P.C further observing that the plaintiff/opposite party is also maintaining his own parents, for which, there is no denial on behalf of defendant-appellant.

9. It is not out of place to mention here that the provision of Section 24 of the Hindu Marriage Act which provided as under:-

"Where in any proceeding under this Act it appears to the court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceeding, it may, on the application of the wife or the husband, order the respondent to pay to the petitioner the expenses of the proceeding, and monthly during the proceeding such sum as, having regard to the petitioner's own income and the income of the respondent, it may seem to the court to be reasonable.

[Provided that the application for the payment of the expenses of the proceeding

and such monthly sum during the proceeding, shall, as far as possible, be disposed of within sixty days from the date of service of notice on the wife or the husband, as the case may be.]"

10. Having due regard to the provision of Section 24 of Hindu Marriage Act, the Court is required to take into consideration the income of the parties before deciding the quantum of the interim maintenance. The Court has to keep in view of the need of the applicant-defendant and paying capacity of the plaintiff-opposite party, this view was taken in the case of ***Padmavathi Vs. C. Lakshminarayana, AIR 2002 Kant 424***. Further, the Himanchal Pradesh High Court in the case of ***Neelam Kalia Vs. Rajesh Kalia, AIR2013 HP 76*** was pleased to observe that if maintenance is being paid under section 125 of the Code of Criminal Procedure, 1973 , the same though can be taken into consideration while granting maintenance pendentelite under Section 24 of the Hindu Marriage Act, 1955. The Hon'ble Apex Court in the case of ***Captain Ramesh Chander Vs. Veena Kaushal, AIR 1978 SC 1807*** was pleased to observe that mere divorce does not end the right to maintenance. The Madras High Court in the case of ***Manokaram Vs. Devaki, AIR 2003 Mad 212*** was pleased to observe that during the pendency of the divorce proceedings at any point of time if the wife establishes that she has no sufficient independent income for her support, it is open to her to claim maintenance pendente lite.

11. In our view the provisions of Section 24 of the Hindu Marriage Act provides for support to be given by the earning spouse in favour of non earning spouse during the pendency of proceedings before the court.

12. But in the present case, the wife (defendant-appellant) is a government teacher and she is getting a handsome salary which is sufficient for her to maintain herself, therefore, she is not entitled to get the benefit of maintenance as provided under Section 24 of the Hindu Marriage Act and the two children are also getting an amount of Rs.4,000/- per month for their maintenance vide order dated 28.11.2017 passed in an application filed under Section 125 Cr.P.C. by defendant-applicant.

13. Therefore, in the present case, the defendant-appellant is not in need of any amount as provided under the provisions of Section 24 of the Hindu Marriage Act. She is also working as Headmistress in the Primary School and receiving handsome salary for maintaining herself and she can bear the expenses of the litigation without any difficulty. Apart from this, the plaintiff-opposite party is paying Rs.4,000/- per month to each of the daughters regularly (total of Rs.8000/-) for their maintenance and there is no case set up by the defendant-appellant that the plaintiff-opposite party has committed default in payment of the amount to the above minor daughters.

14. In view of the observation made above and the law laid down by the Hon'ble Apex Court and the High Court in this regard, we are of the view that there is no dispute that the defendant-appellant is earning good salary as she is the government employee and working as Headmistress in Primary School, therefore, she can maintain herself and she can bear the expenses of litigation and therefore, she is not entitled for any relief under section 24 of the Hindu Marriage Act,1955.

15. The Court below after considering all the materials on record has rightly come to the conclusion that the defendant-appellant is not entitled for any relief, under Section 24 of the Hindu Marriage Act, 1955 and has rightly rejected the application 18-ga filed by the defendant-appellant.

16. However, considering the peculiar facts and circumstances of the case, the Principal Family Judge, Jaunpur is directed to make every possible endeavour to decide the Case No. 943 of 2015 (Sushil Kumar Yadav Vs. Geeta Devi) filed u/s 13 of the Hindu Marriage Act within a period of six months from the date of filing of a certified copy of this order.

17. Subject to the aforesaid direction, this appeal is ,accordingly, **dismissed.**

18. No order as to cost.

(2021)06ILR A149
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 25.06.2021

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Misc. Single No. 5147 of 2015

Smt. Hadisul Nisha ...Petitioner
Versus
Addl. Commissioner (J) & Ors. ...Respondents

Counsel for the Petitioner:
S.K. Upadhyay, Pradeep Kumar Maurya, Pramesh Kumar Jaiswal

Counsel for the Respondents:
C.S.C., Adnan Ahmad, B.K. Singh, Varun Pratap Singh

(A) Civil Law - Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 - Sections 171 (1) , 172 (2) - Uttar Pradesh Land Revenue Act, 1901 - Sections 34 , 35 , 219 - Uttar Pradesh Revenue Code 2006 - Sections 34, 35 - Land Law - Excess jurisdiction -Mutation proceedings being summary proceedings, only decide the question of liability to pay taxes/land revenue to the Government - mostly decided on the basis of possession - a proclamation is made on the basis of mutation application in favour of a person who has obtained possession on his having shown to the court evidence that he was in possession, in support of his objection. (Para - 15,27)

Petitioner (widow) - name recorded on the basis of succession - Opposite Party No.3 (brother of Petitioners husband) initially filed an application for mutation on the basis of forged Will deed - dismissed for want of prosecution - application for recall of the order - not pressed by Opposite Party No.3 - after nearly ten years moved another application for mutation of property - ground - remarriage of the petitioner - rejected by the Tehsildar - Appeal before Sub Divisional Magistrate - allowed ex-parte - Revision before Additional Commissioner - rejected - observations being prejudicial to the petitioner's interest - holding her to have remarried - dis-entitled to inherit the property of her late husband - petitioner filed Writ Petition.(Para - 2,3,4,5)

HELD:- There is no finding recorded either by the Appellate Court or by the Revisional Court as to who was in actual possession of the property in question and therefore liable to pay revenue to the Government. The orders impugned have placed reliance on the issue of whether petitioner had remarried or not. The evidence produced by either side being inconclusive, still a finding was recorded that the petitioner had remarried and therefore was disentitled to the property of her late husband as per Sections 171 and 172 of the U.P.Z.A. & L.R. Act. The orders impugned being clearly in excess of jurisdiction conferred on such authorities, and also against the statutory provisions of the U.P. Land Revenue Act, are set aside. (Para - 29,30)

Writ Petition allowed. (E-6)

List of Cases cited:-

1. Jaipal (Minor) Vs Board of Revenue, UP Allahabad, 1956 ALJ 807 (DB

2. Smt. Sawarni Vs Inder Kaur & ors., 1996 (6) SCC

3. Lal Bachchan Vs Board of Revenue, 2002 (22) LCD 115

4. Bindeshwari Vs Board of Revenue, 2002 (1) AWC 498

5. Puran Singh Vs Board of Revenue, 2004 (1) AWC 853

6. Jagdish Narain & ors. Vs Board of Revenue, 2007 (1) ADJ 434

7. Suraj Bhan & ors. Vs Financial Commissioner & ors., (2007) 6 SCC 186

8. Buddh Pal Singh Vs St. of U.P. & ors., 2012 (5)ADJ 216

9. Vinod Kumar Rajbhar Vs St. of UP & ors., 2012 (2) AWC 1982

10. Ashok Kumar Vs Chairman Board of Revenue UP Lucknow, 2013(1) ADJ 646

11. Mohammed Ismael @ Kallu Vs Board of Revenue, 2013 (4) AWC 3687

12. Vijay Shankar Vs Additional Commissioner (administration) Lko. Division & ors., 2015 (3) AWC3216

13. Tulsi Ram & ors. Vs Additional Commissioner Judicial Lko. & ors., 2016 (34) LCD 250

14. Awadhesh Singh Vs Additional Commissioner & ors., 2017 (9) ADJ 378

15. Gaj Ram Vs St.of UP & ors., 2017 (5) AWC 5217

16. Birendra Kumar Singh & ors. Vs Commissioner, Devi Patan Mandal, & ors., 2019 (12) ADJ 82

17. Radhey Shyam & ors. Vs St. of U.P. & ors., 2016 (34) 4 LCD 1793

18. St. of M.P. Vs Babulal, AIR 1977 Supreme Court 1718

19. Rudramani Shukla Vs Subhash Kumar, 2017 (3) ADJ 510

20. Vijay Shankar Vs Addl Commissioner, 2015 (33) LCD 1073)

21. Amarnath Arora Vs Board of Revenue U.P. Lko., 2019 LCD 775

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

1. This writ petition has been filed by the petitioner Hadisulnisha for quashing of the order dated 23.01.2014 passed by the Sub Divisional Magistrate Sultanpur, in Appeal No. 89 of 2014, and for quashing of the order dated 13.04.2015, rejecting the petitioners' restoration/recall application as also for quashing of the order dated 03.08.2015 passed by the Additional Commissioner in Revision No. 2719 under section 219 of the UP Land Revenue Act.

2. It is the case of the petitioner that she is the widow of Late Kamaal Ahmad son of Nazir Khan, the recorded tenure holder of several plots of land situated in village Seur Chamurkha, Pargana Bharosa, Tehsil Sadar, District Sultanpur. Late Nazir Khan had two sons, Late Kamaal Ahmad and one Ansar Ahmad, who has been arrayed as the opposite party no.3. Kamaal Ahmad the husband of the petitioner died in June 1999 and the petitioner"s name was recorded under PA 11 by the Revenue Inspector on the basis of succession. The opposite party No.3being the real brother of Kamaal Ahmad initially filed an application for mutation on the basis of forged Will deed which was dismissed for

want of prosecution. An application was moved for recall of the order which was subsequently not pressedby Opposite Party No.3.

3. The opposite party no.3 after nearly ten years moved another application on 19.01.2009 for mutation of property of late Kamaal Ahmad on the ground of remarriage of the petitioner after the death of his brother. It was alleged that the petitioner had married one Atiq Ahmad resident of village Rethua, Pargana Haveli, District Faizabad. The said mutation application was rejected by the Tehsildar on 08.11.2013. The opposite party No.3 preferred an Appeal before the Sub Divisional Magistrate (hereinafter referred to as "opposite party no.2") on 12.01.13, registered as Appeal No.89/13.

4. It is the case of the petitioner that wrong address of the petitioner, showing her to be resident of village Rethua District Faizabad, was mentioned in the Appeal as a result whereof no notice was ever served upon the petitioner. The Appellate Court presumed service upon the petitioner on the ground that notice had been sent through ordinary post, through registered post, and then substituted service was adopted through publication in the newspaper. The appeal was allowed ex-parte on 23.01.2014. The petitioner having derived knowledge of the said appellate order through village gossip moved an application for restoration/recall of order dated 23.01.2014 on 03.02.2014 but the same was rejected by the Appellate Court by observing that notice had been sent on the address mentioned in the Appeal and The Restoration application lacked details of date of deriving knowledge of the order passed in Appeal and the mode and manner of deriving such knowledge.

5. The petitioner being aggrieved filed a Revision before the Additional Commissioner who rejected the same by making certain observations also on the merit of the case as set up by the parties. Such observations being prejudicial to the petitioner's interest and holding her to have remarried and thus being dis-entitled to inherit the property of her late husband, the petitioner has approached this Court in Writ Petition.

6. This Court has gone through the pleadings on record. The petitioner in paragraph 10 of the writ petition states clearly that she is still living in the house which had been left by her late husband late Kamaal Ahmad and had not married anyone after his death. It is her case that she is still in possession over the entire property left by her husband and to substantiate her claim she has filed photocopies of all relevant documents including electricity bills, ration card, voter ID card, Aadhaar card, Population Register, Family Register and copy of receipt of Gas connection and Bank passbook issued to her showing her address as village Seur Chamurkha, collectively as Annexure 8 to the writ petition.

It has been submitted in paragraph 16 of the writ petition that the opposite party no.3 had filed a Revision against an order dated 14.02.2014 in a different proceeding under section 210 of the Land Revenue Act, where he had shown the address of the petitioner as Seur Chamurkha, Pargana Bharosa, Tehsil Sadar, district Sultanpur. True copies of the memo of the Revision and order passed on 03.06.2014 have been filed Annexure 12 and 13 to the petition.

It has been further submitted that the petitioner challenged the order dated 03.06.2014 before this Court where a

direction was issued to the SDM to decide the restoration application expeditiously.

There is reference of another Writ Petition number 3340 (M/S) of 2015 where in the Court directed the Revisional Court to hear the matter positively on 26.06.2015, and in case due to unavoidable reasons it could not be heard on 26.06.2015, then it may be taken up on the next working day and so on and so forth till it was finally decided. After service of the order passed by this Court, the Revisional Court was not deciding the Revision and therefore the petitioner filed a Contempt Petition No. 1439 (C) of 2015:Hadisulnisa versus Dr. Abha Gupta. This Court directed the CSC to seek instructions. The Addl Commisioner Dr Abha Gupta, who was under transfer, preponed the date of listing of the Revision in the absence of the counsel for the petitioner and decided the same 3.8.2015 before leaving Sultanpur. The petitioner came to know of the order passed on 03.08.2015 only on 04.08.2015 when the petitioner reached the Court as the date had been fixed in the Revision earlier as 04.08.2015.

7. It has been submitted that the Revision had been decided on 03.08.2015 without appreciating evidence produced by the petitioner to show that she was still living in Seur Chamurkha and was in possession of the property in question. In the order passed by the Revisional Court it has observed that evidence existed both for and against the petitioner, and that is it is doubtful whether she had remarried or not after the death of her late husband, yet, while disposing of the Revision the Additional Commissioner held that the weight of evidence against the petitioner was sufficient and therefore concluded that she had indeed remarried, thus going beyond jurisdiction and declaring the right of the petitioner to claim succession having been lost on remarriage of the petitioner, which could only have been done by the competent court of law in a suit for declaration.

8. It has been further submitted that the opposite party No.3 had filed a Caveat in the Court of Commissioner Ayodhya, showing the petitioner as resident of village Seur Chamurkha ,Pargana Barosa,district Faizabad whereas the village of the petitioner falls in district Sultanpur.

9. It has been further argued by the learned counsel for the petitioner that after the order passed by the appellate court on 23.01.2014 the opposite party No.3 got his name mutated in the revenue record on the same day and then sold out the property in dispute during the pendency of the Revision on 24.05.2015.

10. In the counter affidavit filed on behalf of the opposite party No.3, in reply to paragraph 10 of the writ petition it has been stated only that the petitioner never moved any application for getting the entries in the Parivar Register of village Rethua District Faizabad deleted and that the voter ID card and Aadhaar card etc., filed as evidence of residence in village Seur Chamurkha District Sultanpur were misleading and the petitioner was herself responsible for not getting her details corrected in the voter I card and Aadhaar card etc. because while enjoying married life with her second husband at the Rethua, she wanted to retain the property of her first husband in Seur Chamurkha.

In response to the specific pleadings in the Writ petition that in two documents i.e. a Caveat application and in a Revision the opposite party No.3 had mentioned the

address of the petitioner as village Seur Chamurkha, it has been only stated that the concurrent findings of fact recorded by the learned three courts below should not be interfered with in writ jurisdiction.

11. With regard to the argument raised by the learned counsel for the petitioner that the Additional Commissioner preponed the date of hearing of Revision from 04.08.2015 to 03.08.2015 in the absence of the learned counsel for the Revisionist, it has been submitted that it is evident from the record that the counsel for the petitioner had himself moved an application on 26.06.2015 for summoning lower court record while also providing copy of the order dated 15.06.2015 passed by this Court to the learned Revisional Court. The Revisional Court summoned the lower court file and fixed next date for hearing as 04.08.2015 on the application moved by the petitioner on 26.06.2015. However, on 01.07.2015 the petitioner filed a contempt petition and concealed the fact that she had herself got the next date fixed in the matter as 04.08.2015. When the Revisional Court received Fax information regarding filing of the contempt petition by the petitioner, the Revisional Court called the Advocates of both the parties and after hearing them on 01.08.2015, fixed the date for further hearing on 03.08.2015. Copies of orders dated 01.08.2015, 03.08.2015, and 04.08.2015 have been filed along with the counter affidavit to show that there was no malice on the part of the Revisional Court in preponing the date for hearing of the Revision. It has also been submitted that on 01.08.2015 the news relating to transfer of the Additional Commissioner was published in the newspapers and on the same day that is on 01.08.2015 Additional Commissioner had preponed the date for further hearing from 04.08.2015 to 03.08.2015 in the presence of the counsel for both the parties.

12. The counsel for the opposite party no.3 further argued on the merits of the case that the petitioner solemnized a second marriage on 25.12.2008, and when the opposite party No.3 came to know of her second marriage he filed an application under Section 34 which was wrongly rejected by the Tehsildar Sadar on 08.11.2013, without looking into evidence produced by him. There were statements of the Gram Pradhans of village Rethua and village Hasanpur, (the parental village of the petitioner), as well as the order of the Additional Development Officer (Panchayat) recording the name of the petitioner in the Family Register of Rethua. Also before the Additional Commissioner was the report of the Tehsil authorities dated 7.6.2014 submitted in pursuance of the order passed by the Sub Divisional Magistrate Sadar. Even the Investigating Officer in the FIR lodged by the petitioner regarding cheating and fraud allegedly committed by the opposite party No.3, had submitted a report on the basis of statements taken by the him of several villagers of village Rethua that the petitioner had married Atiq Khan of the said village.

13. In the counter affidavit filed by the respondent No.3 the contents of paragraph 37 to 66 of the writ petition have been denied altogether in one paragraph 14, and it has been submitted that the appropriate remedy for the petitioner is to file a Regular Suit for declaration of rights and the Writ Petition should not be entertained.

14. The learned counsel for the respondent No.3, Sri Adnan Ahmad, has

also raised the preliminary objection regarding the maintainability of the writ petition against orders passed in mutation proceedings. He has referred to several judgements both by the Supreme Court and by a Division Bench and by Coordinate Benches of this Court to substantiate his argument. The judgements cited by the learned counsel are being listed here in below:-

(i) Jaipal (Minor) versus Board of Revenue, UP Allahabad, 1956 ALJ 807 (DB);

(ii) Smt. Sawarni versus Inder Kaur and others 1996 (6) SCC;

(iii) Lal Bachchan versus Board of Revenue, 2002 (22) LCD 115;

(iv) Bindeshwari versus Board of Revenue 2002 (1) AWC 498;

(v) Puran Singh versus Board of Revenue, 2004 (1) AWC 853;

(vi) Jagdish Narain and others versus Board of Revenue 2007 (1) ADJ 434;

(vii) Suraj Bhan and others versus Financial Commissioner and others 2007 (6) SCC 186;

(viii) Buddh Pal Singh versus State of U.P. and others 2012 (5)ADJ 216;

(ix) Vinod Kumar Rajbhar versus State of UP and others 2012 (2) AWC 1982;

(x) Ashok Kumar versus Chairman Board of Revenue UP Lucknow 2013(1) ADJ 646;

(xi) Mohammed Ismael@Kallu versus Board of Revenue 2013 (4) AWC 3687;

(xii) Vijay Shankar versus Additional Commissioner (administration) Lucknow Division and others 2015 (3) AWC3216;

(xiii) Tulsi Ram and others versus Additional Commissioner Judicial Lucknow and others 2016 (34) LCD 250;

(xiv) Awadhesh Singh versus Additional Commissioner and others 2017 (9) ADJ 378;

(xv) Gaj Ram versus State of UP and others 2017 (5) AWC 5217;

(xvi) Birendra Kumar Singh and others versus Commissioner, Devi Patan Mandal, and others 2019 (12) ADJ 82;

15. The last two judgements have been rendered by this Court after considering the law laid down in various judgements referred to hereinabove, to observe that ordinarily Writ Petitions are not entertained against orders passed in mutation proceedings for the simple reason that even if such orders are interfered with and favourable order is granted to the writ petitioner, it would not amount to settling of rights of the parties. Mutation proceedings being summary proceedings, only decide the question of liability to pay taxes/land revenue to the Government. They are mostly decided on the basis of possession and in case the Tehsildar is unable to satisfy himself as to which party is in possession, he has to ascertain in a summary enquiry as to who is the person best entitled to the property, and shall put such person in possession. However for determination/declaration of right, title and interest to property the parties would still have to approach the competent Revenue or Civil Court, as has been observed by the Supreme Court in *Smt. Sawarni versus Inder Kaur; in paragraph 7 - "mutation of a property in the revenue record does not create or extinguish title nor has it any presumptive value on title. It only enables the person in whose favour mutation is ordered to pay the land revenue in question".*

16. The learned counsel for the petitioner on the other hand has placed

reliance upon judgements of this Court also rendered by Coordinate Benches, where the Courts have observed that despite the settled position with regard to reluctance of the Writ Court to interfere in orders passed in mutation proceedings, there will be facts and circumstances peculiar to a case, which may justify interference in writ jurisdiction. The learned counsel for the petitioner has placed reliance upon Radhey Shyam and others versus State of U.P. and others, 2016 (34) 4 LCD 1793, wherein this Court had observed on the basis of observations made by the Supreme Court in State of Madhya Pradesh versus Babulal, AIR 1977 Supreme Court 1718, that a writ of Certiorari should be issued where the Lower Court acts illegally and there is error on the face of the record. If the court usurped jurisdiction, the record is corrected by Certiorari. This becomes more imperative where the Revisional Court has failed to exercise its jurisdiction vested in it, and such an order, even if passed in mutation proceedings, cannot be sustained in the eye of law and writ petition would be maintainable against such an order.

17. The Court in the case of *Radhey Shyam (supra) observed in paragraph 18 - "although it is settled that mutation proceedings is fiscal in nature and the orders passed therein do not decide the right and title of the parties, ..., orders passed therein being summary in nature, writ petition would not be maintainable, but ..... since there is jurisdictional error, therefore the writ petition would lie against such orders, where Revisional Court has failed to exercise the jurisdiction vested in it. It may also be noticed that although the orders deciding the mutation case to do not decide the right and title of the parties and the judgements rendered therein are not binding upon the court deciding the title ....., but it may be kept in mind that the person whose name is recorded in the Revenue Record can transfer the land through registered sale deed, gift deed etc. In case the sale deed is executed only because of recording of name without having any valid title, the remedy, for the aggrieved person would be to file a suit but for cancellation of sale deed, not for declaration of rights which would consume a very long time and in the meantime even the nature of the land will be changed. Further, the possession would be enjoyed by the persons in whose favour and order of mutation has been passed or the transferee without there being any valid title, and the person having valid title will become a loser for years together, and in some cases if the land has gone into the hands of mafia or musclemen, the rightful owner may not be able to get the fruits of litigation during his life time. These contingencies and situations of the cases, although, may not have legal weight but the factual matrix and the reality of the same cannot be brushed aside while entertaining writ petition against orders passed in mutation cases."*

18. This Court in *Rudramani Shukla versus Subhash Kumar*, 2017 (3) ADJ 510; made similar observations in paragraph 17 which are being quoted hereinbelow:-

"17. Mutation proceedings are important proceedings as, entries based thereon in the record of rights (Khatauni) are presumed to be correct under section 35 of the Land Revenue Act 1901, as also Section 40 of the U.P. Revenue Code 2006, and practically all transactions are made after perusing such entries. No doubt in matters of sale the purchaser is required to make enquiry with due diligence as to the real owner and any dispute in respect

thereof, but if the name is recorded in the revenue records, sale transaction etcetera, are easily made. True it is that Revenue Records are not documents of title by themselves and are for purposes of realisation of revenue, but in view of the presumption attached to them, specially in view of the contents of Khatauni as prescribed in Section 31 of the Revenue Code, 2006, their importance in practical terms hardly needs to be emphasised. It is easy to say that an aggrieved party may establish his right in regular proceedings but the fact is that such proceedings go on for years together, therefore, judicious application of mind in mutation proceedings, even though they are summary proceedings, can at times prevent injustice and prolonged litigation. This is not to suggest that interference in such matters should be made in a routine manner."

19. The Courts in the aforecited decisions have laid down a few parametres for entertaining writs arising out of mutation proceedings. The exceptions that have been carved out being very few, for example:-

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)

20. This Court has perused the orders passed by the Tehsildar dated 08.11.2013 by which the Tehsildar has rejected the application for mutation filed by the opposite party no.3. The Tehsildar noticed that the parties to the litigation were both Muslims and governed by the Muslim law. The burden was upon the opposite party no.3 to prove that the petitioner Hadisul Nisha had remarried Atiq Khan after the death of her first husband. The opposite party No.3 had failed to produce any documentary evidence like Nikahnama. The Maulvi who solemnized the marriage was also not produced. There was no mention of Dower or Mehar by any of the witnesses produced by the Opposite Party No.3. The photocopy of the Parivar Register of village Rethua produced by the opposite party No.3 showed clear interpolation as first the name Rafiq Ul nisha was recorded which was scored out and thereafter the name of Hadisul Nisha shown as wife of Atiq Ahmad. It was also found by the Tehsildar that initially a copy of the Parivar Register which was produced was dated 05.02.2009 where after another photo copy was produced of the same Register dated 20.05.2010, wherein again there was interpolation, and the name of the wife of Atiq Khan was initially shown as

Rafiq Ul Nisha, which was scored out and the name of the petitioner written over it. The order dated 22.03.2009 of the Additional Development Officer (Panchayat) was passed during the pendency of the mutation application. None of the witnesses produced by the opposite party No.3 had stated that they were actually present during the Nikaah ceremony of Hadisul Nisha with Atiq Ahmad. The opposite party No.3 also admitted in his cross-examination that the petitioner used to live in the same house as Opposite party No.3 which was the joint property of the opposite party No.3 and the late husband of the petitioner Kamaal Ahmad. It was stated by him that he used to pay the electricity bills, however, the petitioner Hadisul Nisha had produced copies of Electricity Bills of the same house paid by her. She had also produced copies of Irrigation Receipts and copies of Parivar Register of village Seur Chamurkha, showing her to be the widow of Kamaal Ahmad and living in the same village. The opposite party No.3 could not prove the remarriage of the petitioner on the basis of evidence led by him and therefore his application was rejected.

21. However, the Sub-Divisional Magistrate initially allowed the Appeal filed by the opposite party No.3 and later also rejected the recall application filed by the petitioner on 23.01.2014. The Sub Divisional Magistrate had placed reliance on the opposite party No.3 arguments in Appeal that the name of the petitioner having been recorded in the Family Register of village Rethua, as wife of Atiq Ahmad since 2009, and there being certificates issued by the Gram Pradhans of Seur Chamurkha, Rethua and Hasanpur, to the effect that Hadisul Nisha had married Atiq Khan, the burden was now upon Hadisul Nisha to prove that she had not remarried after the death of Kamaal Ahmad. It was observed that despite notice no documentary or oral evidence was produced by the petitioner to show that the Appellant had made a false claim. The Sub Divisional Magistrate observed that on summoning the lower Court Record, and even after Gazette publication of Notice, the respondent Hadisul Nisha had failed to appear. The Panchayat Register maintained under Section 5 of the Panchayat Raj Act showed the name of Hadisul Nisha as wife of a Atiq Ahmad resident of village Rethua District Faizabad. Hadisul Nisha had not made any effort to get the alleged wrong entry deleted or corrected. There was additional evidence in the form of affidavits of Gram Pradhans of villages Rethua, Seur Chamurkha and Hasanpur, that Hadisul Nisha had remarried. As per law settled by the High Court reported in 1980 ALJ 590 ; it could be said that a Muslim lady remarrying after death of her husband lost her right to the property of her late husband. Also under Section 171 (1) and section 172 (2) of the U.P.Z.A.& L.R. Act, a widow who remarries loses her right to the property of her late husband. The order passed by Tehsildar was set aside, and direction was issued that the name of the opposite party No.3 be recorded in the Revenue Records as successor to the property of Kamaal Ahmad.

22. The Revisional Court after noting the facts as mentioned in the order dated 08.11.2013, and also in the order dated 23.01.2014, framed an issue as to "*whether the Revisionist had remarried after the death of her late husband? "*

It observed that the Election Commission had issued Voters ID card on 15.07.2011 showing the Revisionist to be

widow of Kamaal Ahmad r/o Village Seur Chamurkha. The Parivar Register of village Seur Chamurkha issued on 27.04.2015, also showed the Revisionist as widow of late Kamaal Ahmad. Another copy of the same Family Register issued on 21.08.2003, also showed the petitioner as widow of late Kamaal Ahmad. The original Electricity Bill dated 15.05.2007 also showed the name of the husband of the petitioner as late Kamaal Ahmad. Similarly Ration Card Number 198402 issued to her showed her husband"s name as Kamaal Hamad. The FIR filed on 28.02.2009 in PS Kotwali Nagar, Sultanpur showed the name of the husband of the petitioner as late Kamaal Ahmad. The original Irrigation Receipt dated 18.02.2010 issued in the name of the revisionist, showed her as widow of late Kamaal Ahmad. A second Irrigation Receipt also produced in original, dated 28.06.2010, also showed the petitioner's late husband as Kamaal Ahmad. A Surety Bond with photograph of the revisionist, duly verified by the Additional District and Session Judge, Sultanpur, on 12.10.2011, also showed the petitioner to be residing in village Seur Chamurkha District Sultanpur, and her husband being late Kamaal Ahmad. The certificate issued by the village Gram Pradhan of Seur Chamurkha dated 26.10.2010 which has been relied upon by the Additional District and Sessions Judge in his order dated 12.10.2011 showed the petitioner to be widow of late Kamaal Ahmad.

23. On the other hand, the opposite party no.3 had also produced copies of family register of village Rethua, Tehsil Sohawal, district Faizabad dated 17.01.2009, 05.02.2009, 25.03.2009 showing the name of Hadisulnisha as wife of Atiq Ahmad. The Area Lekhpal had submitted a report on 27.03.2012 that Hadisulnisha's parental house was in Village Hasanpur, and her first marriage took place in village Seur Chamurkha, and on death of Kamaal Ahmad she had married again in the village Rethua . This report was based upon certificate issued by the the gram Pradhan of village Rethua dated 25.03.2012. The Village Panchayat Officer also issued another certificate dated 08.06.2010 that Hadisulnisha was residing in village Rethua after marrying Atiq Ahmad. Information given by Village Development Officer of Seur Chamurkha dated 20.9.2011 was to effect that in the Family Register of the name of Hadisulnisha wife of late Kamaal Ahmad was missing.

24. In paragraph 8 of the Revisional order the Additional Commissioner has observed that evidence existed in favour of both the parties and it was doubtful whether the Revisionist had remarried after the death of her first husband. However, the Additional Commissioner relied upon the report dated 28.04.2012 of Naib Tehsildar Kurebhaar, submitted to the Tehsildar Sadar, Sultanpur on the request made by the opposite party no.3, wherein he had taken statements of Gram Pradhan of village Rethua as well as other residents of the same village who said that Atiq Ahmad had married twice, the second wife was from Sultanpur and often came to the village. The Area Lekhpal had submitted on the basis of statements made by residents of village Rethua that "*it seems that Hadisulnisha widow of late Kamaal Ahmad resident of village Chamurkha,district Sultanpur had remarried."*

The Additional Commissioner observed in the order impugned that from the report of the Area Lekhpal as submitted

through the Tehsildar, Sadar Sultanpur, it was apparent that Hadisulnisha had remarried and on remarriage of a widow she ceases to have any right or claim over the property of her late husband, therefore there was no illegality in the order passed by the Appellate court and the Revision was rejected.

25. It is evident that the Revisional Court despite availability of evidence to the contrary also on record, chose to believe the report of the Area Lekhpal who had taken statements of residents of village Rethua in the absence of and without notice to the revisionist. It is not clear as to why the Tehsildar and Naib Sadar, Sultanpur chose not to summon a report from village Seur Chamurkha in their District Sultanpur, which was under their jurisdiction, and chose to believe the report of the Area Lekhpal submitted on the basis of statements given by residents of a village situated in a different district i.e. district Faizabad.

In doing so the Revisional Court also exceeded its jurisdiction as it gave a finding on fact which affected the title of the petitioner without giving any finding with regard to possession, which alone was necessary to decide a mutation case. The order passed by the Revisional Court is clearly hit by one of the five exceptions carved out by this Court in its various decisions to show interference in orders passed in mutation proceedings. The mutation in this case had been directed not on the basis of possession or simply on the basis of some title deed, but after entering into debate of entitlement to succeeding the property, touching into merits of the rival claims. The entry itself conferred a title on the opposite party No.3 by virtue of the provisions of the U.P.Z.A.& L.R. Act, section 171 and 172. Substantial injustice has been done to the petitioner by the order so passed by the Appellate and Revisional Court.

26. There was no examination of any witness to the alleged wedding nor examination of the said alleged husband of the petitioner Atiq Ahmad. The Appellate Court and the Revisional Court relied upon secondary evidence, the statements of village Pradhans and the report of the Area Lekhpal of village Rethua, saying that he had taken statements of several residents of village Rethua, who indicated that Atiq Ahmad had married twice. One of his wives belonged to Hasanpur village and often came to village Rethua to live with him. All this was done behind the back of the petitioner.

27. In Rudra Mani Shukla versus Subash Kumar (supra), the proceedings in mutation application were decided on merits without any enquiry into the possession. The enquiry was conducted only with regard to proving of the Gift deed by which the respondent therein had claimed mutation in his favour. Mutation being decided without following the procedure prescribed, the writ petition was entertained. It was observed that under Rule A375 of the Revenue Courts Manual, **a proclamation is made on the basis of mutation application in favour of a person who has obtained possession on his having shown to the court evidence that he was in possession, in support of his objection**. This Court had observed that under Section 34 of the U.P. Land Revenue Act every person obtaining possession of any land by succession or transfer, other than a succession or transfer which had already been recorded under section 33A, shall report such succession or transfer to the Tehsildar of the Tehsil in which the land is situated. Under section 35, on receiving a report of transfer or succession or upon facts otherwise coming to

his knowledge, the Tehsildar should make such enquiry as is necessary, and if he is satisfied that such succession or transfer appears to have taken place, he shall direct the Annual Registers to be amended accordingly. Section 40 clearly provides that all disputes regarding entries in the Annual Register shall be decided on the basis of possession.

28. This Court observed in Rudra Mani Shukla (supra) that it was incumbent upon the Tehsildar to make necessary enquiry about the existing entries in the relevant papers and also to make an enquiry as to who was in possession, and then make an order accordingly. In *Amarnath Arora versus Board of Revenue U.P. Lucknow*, 2019 LCD 775; a Coordinate Bench of this court placing reliance upon *Rudra Mani Shukla (supra)* observed in paragraph 27 and 31 Thus:-

"27. what persuades this Court to entertain this writ petition, though the same has been preferred against orders passed in a mutation case, is the fact that in terms of the provisions contained in sections 34 and 35 of the U.P. Revenue Code 2006, the finding of "obtaining possession" is necessarily to be returned by the Court concerned, however, ignoring the said provision since the impugned orders have been passed, without recording a finding in respect of "obtaining possession', I am inclined to entertain this writ petition in the peculiar facts and circumstances of the case and accordingly reject the objection raised by the learned Senior Advocate appearing on behalf of the Respondent no.4 regarding maintainability of the writ petition.

"31. Mutation proceedings in respect of agricultural land which are presently governed by the provisions of sections 34 and 35 of the UP Revenue Code 2006 were earlier governed by sections 34 and 35 of the U.P. Land Revenue Act. The provisions of section 34 of the U.P. Revenue Code 2006 and Section 35 of the UP Land Revenue Act are in Pari materia. In both these provisions, the emphasis, in my considered opinion, is on obtaining possession by transfer..."

29. In the orders impugned, there is no finding recorded either by the Appellate Court or by the Revisional Court as to who was in actual possession of the property in question and therefore liable to pay revenue to the Government. The orders impugned have placed reliance on the issue of whether Hadishul Nisha had remarried or not. The evidence produced by either side being inconclusive, still a finding was recorded that the petitioner had remarried and therefore was disentitled to the property of her late husband as per Sections 171 and 172 of the U.P.Z.A. & L.R. Act.

30. The orders impugned being clearly in excess of jurisdiction conferred on such authorities, and also against the statutory provisions of the U.P. Land Revenue Act, are set aside.

31. The writ petition is **allowed**. All consequences to follow.

(2021)06ILR A160
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 02.07.2021

BEFORE

THE HON'BLE RITU RAJ AWASTHI, J.
THE DINESH KUMAR SINGH, J.

Misc. Bench No. 9591 of 2018

Lucknow Omaxe City Residence & Allottees Association & Ors. ...Petitioners
Versus
State of U.P. ...Respondent

Counsel for the Petitioners:
Mudit Agarwal, Nidhi Agarwal

Counsel for the Respondents:
C.S.C., Anilesh Tiwari, Ashish Chaturvedi, Dr. V.K. Singh, Kuldeep Pati Tripathi, Namit Sharma, Ratnesh Chandra, Shailendra Singh Chauhan

(a) Land Law - Any allottee, assignee or transferee would be having the same rights and obligations as the Developer and bound by the terms and conditions, as applicable to the Developer. (Para 19)

The exchange of land was permitted only after the Developer agreed to provide approach road to the land offered in exchange of Gram Samaj land. The Developer has agreed to provide 18 meters wide approach road running parallel to the land given to the Nagar Nigam in exchange of the Gram Samaj land. If the Developer has made a false promise to its allottees or the petitioner, they may seek appropriate remedy against the Developer, but they cannot encroach upon the rights of the Nagar Nigam of using 18 meters wide approach road, leading to 24 meters wide road whcih connects to Amar Shaheed Path. (Para 19)

Writ Petition Rejected. (E-8)

List of Cases cited:-

1. Satya Pal Anand Vs St. of M.P. (2016) 10 SCC 767

2. R.K. Mittal & ors. Vs St. of U.P. & ors. (2012) 2 SCC 232

3. Machavarapu Srinivasa Rao & anr. Vs Vijavawada, Guntue, Tenali, Mangalagiri Urban Development Authority & ors. (2011) 12 SCC 154

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

1. The present writ petition has been filed by Lucknow Omaxe City Residents & Allottees Association, a Society registered under the Societies Registration Act, 1860 (hereinafter referred to as "The Act, 1860') and its two office bearers, who are also the residents of Housing Complex developed by M/s Omaxe Limited, respondent no. 6 named as 'Omaxe City' and its subsidiary companies (collectively called as 'Developer'). The housing complex has been developed by the M/s Omaxe in an area of around 140 acres at Village Aurangabad Khalsa, Raebareli Road, Lucknow, Near Amar Shaheed Path.

2. The State Government took a policy decision vide Government Order dated 25th January, 1996 in order to mitigate difficulties faced in integrated development of an area/project due to location of parcels of land belonging to Gram Samaj etc. around the area proposed to be developed. It was felt that if such parcels of land were consolidated, then the utility of such land and its value would get substantially increased and, there would not be any impediment to sanction the layout and development plan for such an area. In view of the aforesaid, it was directed that if in any layout plan of any area, for development, the parcels of land of Gram Samaj are situated within the layout plan, then the sanctioning agency of the layout plan would be empowered to consolidate such parcels of land of Gram Samaj and, secure an undertaking from Developer to leave the consolidated land which should have approach road. It was also provided that if providing approach road was not feasible at all, then the value of such parcels of land belonging to Gram Samaj be charged from the Developer. The outlay plan would only be passed, if the Developer would agree to such a condition.

3. On applications filed under Section 161 of the U.P. Z.A. and L.R. Act, 1950 by

the Developer for exchange of Gram Samaj land, which was in different parcels, total area 4.5422 hectares, these lands were ordered to be exchanged with the same amount of land which was offered by the Developer vide order dated 14the December, 2006 passed by the Sub-Divisional Magistrate, Sadar, Lucknow in Case No.03/12/06-07 and two other cases. It was specifically recorded in the said order(s) that the land of Gram Samaj was not the land of public utility and, for the land offered in exchange of the land of Gram Samaj, an approach road was proposed, which would be available for the exchanged land.

4. The land of Gram Samaj subsequently vested in Lucknow Nagar Nigam, Lucknow after issuance of the relevant notification by the State Government under Section 3 of the U. P. Municipal Corporation Act, 1959 (hereinafter referred to as "The Act, 1959') as is provided under Section 126 of the Act, 1959. Initially, in the layout plan submitted by the Developer, they proposed 12 meters wide approach road. The Nagar Nigam granted 'no objection certificate' for the housing project proposed to be developed by the Developer on 24th November, 2002. In the said 'no objection certificate' it was specifically provided that instead of 12 meters wide approach road, 18 meters wide approach road would be constructed. It was further provided that a case regarding exchange of Gram Samaj land to the extent of 24566.62 square meter was pending before the Municipal Corporation, Lucknow and, therefore, till the final decision was taken on the aforesaid subject, the Developer would be allowed to carry out the development work in the proposed layout plan. The affidavits dated 13th April, 2006 on behalf of the Developer were submitted, stating therein that the Developer would provide approach road to the land given in exchange to the Lucknow Nagar Nigam in lieu of the land of Gram Samaj. In pursuance of the aforesaid 'no objection certificate' submitted by the Developer, a revised layout plan was submitted by the Developer before the Lucknow Development Authority, providing therein 18 meters approach road to the land offered to the Municipal Corporation in exchange of the Gram Samaj land.

5. The Lucknow Development Authority approved the layout plan for the housing project of 'Omaxe City' vide Permit No.208280 with certain conditions. One of the conditions i.e. condition no. 6 provided that the Developer should abide by all the conditions mentioned in the 'no objection certificate' given by the Lucknow Nagar Nigam.

6. A perusal of sanctioned layout plan of the housing project, 'Omaxe City' would reveal that at the end of 24 meters wide road connecting to Amar Shaheed Path, 18 meters wide road was provided towards the eastern side running parallel to the side of primary school and thereafter inter college towards the east of the primary school. This road runs parallel to the land given out by the Developer to the Lucknow Nagar Nigam as a measure of exchange value of the land belonging to erstwhile Gram Samaj, Aurangabad Khalsa. This 18 meters wide road provides approach road to the educational institutions, hospital and commercial establishments as well. The Lucknow Nagar Nigam has proposed construction of housing project on the area given by the Developer in exchange of the Gram Samaj land.

7. It appears that the Developer constructed the boundary wall on the

approach road, blocking access to the chunk of land, now in possession of the Lucknow Nagar Nigam, which was given in exchange of the Gram Samaj land by the Developer. The Lucknow Nagar Nigam has planned a colony for lower income group, middle income group and high income group on the said land. The development plan under Section 14 of the U.P. Urban Planning and Development Act, 1973 (hereinafter referred to as "The Act, 1973'), has been sanctioned on 21st March, 2017. A building plan has also been sanctioned by the Lucknow Development Authority on the same day i.e. 21st March, 2017. As per the sanctioned building plan for the land of the Lucknow Nagar Nigam, a gate, measuring 22.460 meters wide from 18 meters wide approach road on the land of the Lucknow Nagar Nigam is provided.

8. As per the petitioners, the Developer aggressively marketed the project 'Omaxe City' in the year 2005-2006 and issued several advertisements, invited booking from the prospective home buyers, offering a closed township with a boundary wall running around it with only one main entrance. The home buyers, who bought the flats, (around 750) got attracted to the facilities offered by the Developer, besides safety and of a closed township. The Developer offered plots, villas and residential houses in the said township and the members of the petitioner no.1 bought the plots, villas and houses. The Lucknow Nagar Nigam started developing its project for construction of LIG, MIG and HIG flats (500) on the land which it was given by Developer in exchange of the Gram Samaj land. Finding 18 meters wide approach road, leading to the land of the Lucknow Nagar Nigam having been closed by constructing a boundary wall, on 18th March, 2017, a portion of 25 meters wide boundary wall was demolished by the Lucknow Nagar Nigam. However, the boundary wall, which was demolished by the Lucknow Nagar Nigam, was re-constructed by petitioner no.1 on the intervention of the authorities and the police.

9. Aggrieved by the demolition of the boundary wall by the Lucknow Nagar Nigam, the petitioners have filed the present writ petition with the following reliefs:-

"(i) Issue a writ, order or direction in the nature of mandamus directing the respondent No. 2 not to break the boundary wall of the Omaxe City township and create Entry and/or exit for the residential project being developed on its land in village - Aurangabad Khalsa between the Omaxe City Township and SGPGI, through the Omaxe City township.

(ii) Such other/further relief as may be deemed to be just and appropriate in the facts and circumstances of the case may also be granted in favour of the petitioners as against the respondents.

(iii) Costs..... against the respondents."

10. Heard Mr. J.N. Mathur, learned Senior Advocate assisted by Mr. Mudit Agarwal, learned counsel for the petitioners, Mr. L.P. Mishra assisted by Mr. Namit Sharma, learned counsel on behalf of the opposite party no.2/Nagar Nigam, Mr. Ratnesh Chandra, learned counsel for opposite party no. 3/Lucknow Development Authority, learned standing counsel for opposite parties no. 1, 4 and 5 and Mr. N.K. Seth, learned Senior Advocate assisted by Mr. Ashish Chaturvedi, learned counsel for the opposite party no.6.

Judgment reserved.

11. Shri J.N. Mathur, learned Senior Counsel, appearing for the petitioners has submitted that there is already an approach road, leading to the land of the Lucknow Nagar Nigam. This approach connects the road below Shaheed Path. It is submitted that the 18 meters wide approach road from 24 meters wide road was made only for the residents of the petitioners-society, which is a gated community. It is not a thoroughfare. It is further submitted that if the 18 meters wide road is allowed to be used by the Lucknow Nagar Nigam or the residents of the proposed project of the Lucknow Nagar Nigam, privacy of the petitioner no. 1's members shall be affected and, it would be against the building and layout plans sanctioned for construction of the housing project, 'Omaxe City'. It is further submitted that at present 30 feet wide public road, which directly connects to the land of the Lucknow Nagar Nigam, is being used for transporting construction material to the side of the Lucknow Nagar Nigam. It is further submitted that the Government Order dated 25th January, 1996 provides only a safeguard for the land offered in exchange of the Gram Samaj land as it should not be a land locked. It never obligated the builder or any person, exchanging the land to provide a road despite there being a pre-existing public road leading to the land given in exchange of Gram Samaj land. In respect of undertaking given by the Developer in the proceedings under Section 161 of the Act, 1950, it has been submitted that the said undertaking was given without disclosing the same to the members of the petitioner no.1 and such an undertaking would be in violation of the contract entered into between the members of the petitioner no 1 and the Developer and, it amounts to an illegal and void undertaking. It is further submitted that providing access to the residents in the proposed project of the Lucknow Nagar Nigam through 18 meters wide road, approaching to the "Omaxe City" would destroy the concept of a gated township and the roads of the colony would become a thoroughfare. It is further submitted that an agreement or undertaking of the Developer to the Lucknow Nagar Nigam, which affects the vested right of the members of the petitioner no. 1, is not binding on them and, it would be void as the petitioner no. 1 and its members were not party to such undertaking or any agreement which was entered into between the Lucknow Nagar Nigam and the Developer. It is further submitted that since the petitioners were promised a gated colony/housing project/township and providing access to the Lucknow Nagar Nigam from 18 meters wide road to the proposed project of the Lucknow Nagar Nigam would violate the fundamental promise made by the Developer of exclusive a gated township.

12. On the other hand, Mr. L.P. Mishra, learned counsel for the Lucknow Nagar Nigam, has submitted that the conditions of exchange of the land specifically provided that the Developer would ensure an approach road to the land offered in exchange. The land of the Gram Samaj was exchanged under this policy and, therefore, neither the Developer nor the petitioner no. 1 or its members, who are assignee/transferee/successor of the Developer can plead anything contrary to the policy decision dated 25th January, 1996. It is further submitted that the petitioners are bound by the terms and conditions under which the housing project of the 'Omaxe City' was sanctioned and the land was given in exchange. The

transferee/assignee/successor steps into shoes of the predecessor and is entitled and bound by the rights and obligations of the predecessor-in-interest. When 18 meters wide approach road was agreed by the Developer and, it was a condition for the exchange as well as one of the conditions of 'no objection certificate' issued by the Lucknow Nagar Nigam, then the Developer or its assignee/transferee/successor cannot wriggle out of this obligation. The Developer as well as its transferee, assignee or successor is under obligation to maintain 24 meters wide approach road from the Shaheed Path and thereafter 18 meters approach road, leading to the land of the Lucknow Nagar Nigam, Lucknow, a condition of exchange, as mentioned in the sanctioned plan, free from encroachment so that the Lucknow Nagar Nigam has access to its land without any obstacle. It is further submitted that under Section 14 of the Act, 1973, the terms and conditions of the sanctioned layout plan are binding on the Developer as well as its assignee/transferee/successor, which specifically provided 18 meters wide approach road, running parallel to the land given by the Lucknow Nagar Nigam in exchange and, it was their duty to maintain 24 meters wide road and thereafter 18 meters wide approach road till such housing project of the Developer is handed over to the Lucknow Nagar Nigam. After handing over the said road, it would be the responsibility of the Lucknow Nagar Nigam to maintain the same. It is also submitted that 18 meters wide approach road from 24 meters wide approach road leads to the public utility facilities such as the educational institution, hospital, market and other commercial establishments earmarked as such in the sanctioned plan and, therefore, the submission made on behalf of the petitioners that the 18 meters wide approach road is exclusively meant for use of residents of the housing project of the 'Omaxe City' gets falsified. The learned counsel for the Lucknow Nagar Nigam, has submitted that the Nagar Nigam will construct such a gate where boundary wall on 18 meters wide approach road is existing, blocking access to its land, so that the area of Omaxe City and the residential complex constructed by the Lucknow Nagar Nigam are separated. The petitioners or the Developer should not have any objection for constructing the gate as proposed by the Lucknow Nagar Nigam, which is also shown in the sanctioned building plan of the Lucknow Nagar Nigam.

13. Mr. N. K. Seth, learned Senior Counsel, appearing for the Developer, besides raising a preliminary objection regarding maintainability of the writ petition against a private person i.e. respondent no. 6, has submitted that providing 18 meters wide approach road to the Lucknow Nagar Nigam from 24 meters wide approach road was a pre-condition of exchange of land of Gram Samaj and the Developer was bound to provide 18 meters wide approach road, leading to the land of the Lucknow Nagar Nigam. The learned counsel has further submitted that if the Developer did not agree with providing 18 meters wide approach road to the land of the Lucknow Nagar Nigam, the exchange was not possible. The learned counsel has further submitted that the boundary wall was subsequently constructed so that the encroachment could be avoided. The learned counsel has further submitted that the residents or the petitioners are not correct to say that the 18 meters wide approach road was exclusively meant for their use. The learned counsel has further submitted that the Developer is bound by

the sanctioned building plan, the condition of 'no objection certificate' and the condition of exchange. The learned counsel has further submitted that the petitioners cannot claim a better right or title than of the Developer. The learned counsel has further submitted that in the layout plan, in respect of the housing complex 'Omaxe City', condition no. 6 specifically provided that the Developer would be bound by the conditions as mentioned in the 'no objection certificate' issued by the Municipal Corporation, Lucknow. The allottees/petitioners being fully aware of the conditions of the sanctioned plan had entered into the agreement after due verification of all facts. The allotment letter, sale-deed etc. specifically mentioned that the allottees had confirmed that they had seen and understood the tentative plans, designs and specifications of the project and, they agreed to the same. The Developer has developed and completed the housing project in accordance with the sanctioned plans and completion certificate dated 21st April, 2010 was issued in respect of Phase-I and a separate completion certificate dated 24th April, 2010 was issued in respect of Phase-II by the Lucknow Development Authority. The learned counsel has further submitted that the petitioners have filed Writ Petition No.1366 (M/B) of 2015 before this Court, challenging the issuance of completion certificates, as mentioned above, and for issuance of a direction to the Developer to complete development work of the housing project as per the bylaws and the sanctioned plan. The learned counsel has, therefore, submitted that once the petitioners have come before this Court, asking a direction for completion of the housing project in accordance with the sanctioned plan, they cannot, in the present petition, be allowed to say that they are not bound by the sanctioned plan or they were not aware of the sanctioned plan. The learned counsel has further submitted that since no effective relief has been sought against the respondent no. 6/Developer, the writ petition against the respondent no. 6 is liable to be dismissed. The subject matter of the writ petition pertains to the contractual obligations of the parties, therefore, the writ petition is liable to be dismissed.

14. We have considered the submissions advanced by the learned counsel appearing for the parties.

15. Under the policy decision dated 25th January, 1996 under which exchange of the land was permitted, it was provided that order of exchange would be passed only after the Developer agreed to provide approach road to the land offered in exchange of Gram Samaj land. The Developer had agreed to provide 18 meters wide approach road from the 24 meters road running parallel to the land given to the Nagar Nigam in exchange of the Gram Samaj land. The sanctioned layout plan of the Developer regarding the housing project, namely, 'Omaxe City' also would indicate that 18 meters wide approach road from 24 meters road, running parallel to the land of the Lucknow Nagar Nigam was provided. In the sanctioned plan of the Lucknow Nagar Nigam for its housing project on the exchanged land, 18 meters wide approach road is proposed. The counsel for the Developer has specifically stated that they had agreed to provide 18 meters wide approach road leading to the land of the Lucknow Nagar Nigam and, it was a condition precedent for exchange, otherwise exchange was not possible. With respect to the boundary wall constructed over the 18 meters wide approach road,

blocking access to the land of Lucknow Nagar Nigam, it has been submitted that the boundary wall was reconstructed only for a purpose to protect it from encroachment, but it was never meant that the Lucknow Nagar Nigam would not be provided access through 18 meters wide approach road.

16. It is well settled that any allottee, assignee or transferee would be having the same rights and obligations as the Developer and bound by the terms and conditions, as applicable to the Developer. The Supreme Court in the case of ***Satya Pal Anand Vs. State of Madhya Pradesh, (2016) 10 SCC 767*** in paragraph-31 has held as under:-

"31. The aforementioned reported decision has noted the subtle distinction between ultra vires act of the statutory authority and a case of a simple infraction of the procedural Rule. The question, whether the Society was competent to unilaterally cancel the allotment of a plot given to its member and to cancel the membership of such member due to default committed by the member, is within the purview of the business of the Society. Any cause of action in that regard must be adjudicated by the procedure prescribed in that behalf. It is not open to presume that the Society had no authority in law to take a decision in that behalf. The right of the appellant qua the plot of land would obviously be subject to the final outcome of such action. The appellant being the legal representative of the original allottee, cannot claim any right higher than that of his predecessor qua the Housing Society, which is the final authority to decide on the issue of continuation of membership of its member. The right of the member to remain in occupation of the plot allotted by the Society would be entirely dependent on that decision."

17. There is sanctity to the sanctioned building plan. Neither the Developer nor its allottees, assignees or transferees are entitled to deviate from the sanctioned building plan. The Supreme Court in the case of ***R.K. Mittal and others Vs. State of U.P. and others, (2012) 2 SCC 232*** has held in paragraphs 56, 58, 68 and 72 as under:-

"56. The running of a bank or a commercial business by a company in the residential sector is certainly not permissible. In fact, it is in patent violation of the Master Plan, Regulations and the provisions of the Act. We see no power vested in the Development Authority to permit such user and ignore the misuse for such a long period.

58. The conduct of the authorities, prior to institution of the writ petitions in the High Court, showed uncertainty and wavering of mind in its decision-making processes. In fact, it was expected of the Development Authority to take a firm and final decision and put at rest the unnecessary controversy raised by its proposal. However, once the writ petitions were filed, thereafter, the stand of the Development Authority has been consistent and unambiguous. In the counter-affidavit filed in this Court, it has been stated that even in case of grant of permission to the abovestated two banks, no extension was granted and in fact show-cause notices have been issued to all the banks in the residential sector to wind up their activities and move out of the residential sector. It is the definite case of the Development Authority that banking activity is a commercial activity and therefore, cannot be carried on in the residential sector,

more particularly on the plots in question. In regard to Sector 19, a specific averment has been made in the affidavit of the Development Authority that the land use is residential alone and is neither commercial nor mixed. As per the Master Plan, its primary use is "residential" where plots are planned for residential purpose alone. It is, therefore, abundantly clear from the pleadings on record that commercial activity of any kind in the residential sector is impermissible. These pleadings are in conformity with the statutory provisions and the Master Plan.

68. The Master Plan and the zonal plan specify the user as residential and therefore these plots cannot be used for any other purpose. The plans have a binding effect in law. If the scheme/master plan is being nullified by arbitrary acts and in excess and derogation of the power of the Development Authority under law, the Court will intervene and would direct such authorities to take appropriate action and wherever necessary even quash the orders of the public authorities.

72. From the above dictum of this Court, it is clear that environmental impact, convenience of the residents and ecological impact are relevant considerations for the courts while deciding such an issue. The law imposes an obligation upon the Development Authority to strictly adhere to the plan, regulations and the provisions of the Act. Thus, it cannot ignore its fundamental duty by doing acts impermissible in law. There is not even an iota of reason stated in the affidavits filed on behalf of the Development Authority as to why the public notice had been issued without amending the relevant provisions that too without following the procedure prescribed under the law."

18. The similar view has been taken in the case of ***Machavarapu Srinivasa Rao and another Vs. Vijavawada, Guntur, Tenali, Mangalagiri Urban Development Authority and others, (2011) 12 SCC 154*** in paragraph 20, which is extracted herein below:-

20*. An analysis of the abovenoted provisions shows that once the master plan or the zonal development plan is approved by the State Government, no one including the State Government/Development Authority can use land for any purpose other than the one specified therein. There is no provision in the Act under which the Development Authority can sanction construction of a building, etc. or use of land for a purpose other than the one specified in the master plan/zonal development plan. The power vested in the Development Authority to make modification in the development plan is also not unlimited. It cannot make important alterations in the character of the plan. Such modification can be made only by the State Government and that too after following the procedure prescribed under Section 12(3)."*

19. If the Developer has made a false promise to its allottees or the petitioners, they may seek appropriate remedy against the Developer, but they cannot encroach upon the rights of the Nagar Nigam of using 18 meters wide approach road, leading to 24 meters wide road which connects to Amar Shaheed Path. In view of the specific stand of the Developer, the petitioners cannot claim a higher right than what the Developer has. The sanctioned building plan specifically provided 18 meters wide approach road from 24 meters wide road, running parallel to the land of the Lucknow Nagar Nigam. Any

obstruction created either by the Developer or the petitioners is illegal and would amount unauthorized encroachment. The writ petition, therefore, lacks merit and is liable to be dismissed.

20. With the aforesaid observations/directions, the present writ petition is hereby **dismissed.**

(2021)06ILR A169
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 07.06.2021

BEFORE

THE HON'BLE JASPREET SINGH, J.

Misc. Single No. 9735 of 2020
Alongwith
Misc. Single No. 4515 of 2020

Dr. Dheeraj Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Gaurav Mehrotra, Maria Fathima, Santosh Kumar Tripathi

Counsel for the Respondents:
C.S.C., Abhishek Yadav, Archana Yadav, Atul Dwivedi, Atul Kumar Dwivedi, Dr. L.P. Mishra, Lalta Prasad Misra, Prabhat Kumar Mishra, Sharad Pathak

(A) Civil Law - The Societies Registration Act, 1860 - Section 4 - Annual list of managing body to be filed, Section 4-A - Changes etc. in rules to be intimated to Registrar , Section 4-B - list of members of General Body of that society shall be filed with the Registrar - an individual member is not authorized to take up the cause of the Society unless he is so authorized. (Para - 80)

(B) Civil Law - The Societies Registration Act, 1860 - Deputy Registrar - Authority - powers conferred under the Societies Registration Act, 1860 - covered under the Article 12 of the Constitution of India - all its decisions are required to comply with the doctrine of equality and fairplay including granting of an opportunity of hearing - order impugned does not reflect any application of judicial mind nor it incorporates any reasons in the order - any order which is bereft of reasons cannot be sustained as it violates the basis principles of equity and fairplay - **Held** - Deputy Registrar has abdicated its duties and the impugned order has been passed without granting opportunity of hearing to the petitioner(Dr. Dhiraj Singh) also it does not refer to the entire facts and material before the Authority concerned nor the effect and implications of the material before it was considered apart from the fact that the impugned order is bereft of reasons and is liable to be set aside. (Para - 110,114,117)

(C) The Societies Registration Act, 1860 - byelaws of the Society - unless and until a person is a subsisting valid and bonafide member of a Arya Samaj in that district, he cannot be a member of Arya Pratinidhi Sabha - Deputy Registrar rejected representation of petitioner (Devendra Pal Verma) - petitioner could not establish that he was a member of the Arya Pratinidhi Sabha - **Held** - as far as the merit of the order dated 02.11.2019 is concerned, the same does not suffer from any error apparent on the face of the record nor the finding recorded by the Deputy Registrar in the said impugned order can be termed to be perverse or the conclusion arrived at is such that any prudent person could not arrive at such a conclusion, hence, this Court is not persuaded to intervene in the matter.(Para -118,123,124,131)

Writ Petition (No. 9735 (MS) of 2020) allowed.

Writ Petition (No. 4515 (MS) of 2020) dismissed. (E-6)

List of Cases cited:-

1. Ayub Khan Noor Vs St.of Mah. , 2013 Vol. (4) SCC 465.

2. Umesh Chandra & anr. Vs Mahila Vidyalaya Society , 2006 (24) LCD 1373.

3. Umesh Chandra & anr. Vs Mahila Vidyalaya Society , 2006 (24) LCD 1373

4. Kalashi Das Shiksha Sansthan Vs Regisrar Firms , 2013 (31) LCD 1102.

5. Jagdimbaka Prasad Pandey Vs St.of U.P. & ors. , 2019 (8) ADJ 536

6. Banwari Lal Kanchal Vs Bhartendu Agarwal & ors. , 2019 (12) ADJ 235 (DB) (LB)

7. Ratan Kumar Sirohi Vs St.of U.P. & ors. , 2010 (1) ADJ 262

8. T.P. Singh (Enrol No. 2473) Senior Advocate-Vs Registrar/Assistant Registrar Firms Societies and Chits Aliarganj & 4 ors. , 2018 SCC Online Alld 1927

9. Canara Bank Vs Debashish Das & ors. , (2003) 4 SCC 557

10. Prakash Ratan Sinha Vs St.of Bihar & ors. , (2009) 14 SCC 690

11. Nisha Devi Vs St.of H.P. & ors. , (2014) 16 SCC 392

12. M/s Neeharika Infrastructure Pvt. Ltd. Vs St.of Mah. , AIR 2021 SC 1918

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

1. These two writ petitions assail two different orders passed by the Deputy Registrar, Firms Societies and Chits, Lucknow. The first Writ Petition bearing No. 9735 (MS) of 2020 has been preferred by Dr. Dhiraj Singh who claimed to be the President of Arya Pratinidhi Sabha, Uttar Pradesh and he has assails the validity of the certain proceedings of an alleged meeting said to have been held on 16.02.2020 wherein a No Confidence Motion, initiated at the behest of respondent no. 4, is said to have been successfully passed, as a consequence, the petitioner has been removed from being the President of the society and further the Deputy Registrar by means of the impugned order dated 19.02,2020 has approved and accepted the alleged minutes of meeting tacitly and directed the registration of a fresh list of members submitted by the respondent no. 4. The order dated 19.03.2020 and consequential order dated 20.03.2020 are under challenge in this writ petition.

3. The other writ petition No. 4515 (MS) of 2020 has been filed by Sri Devendra Pal Verma, who claimed himself to be the elected President of Arya Pratinidhi Sabha, Uttar Pradesh, a society registered under the Societies Registration Act, 1860. In an earlier round of litigation the issue of membership of Devendra Pal Verma was raised and the same was directed to be decided by the Deputy Registrar. In furtherance of the order passed by this Court dated 30.07.2019 the Deputy Registrar after hearing Sri Devendra Pal Verma found that his expulsion was in accordance with the bye-laws of the Society and he declined to interfere with the complaint/ representation of Sri Verma. This order dated 02.11.2019 and the consequential order dated 07.11.2019 have been assailed by Sri Verma in W.P. No. 4515 (MS) of 2020.

3. Since the dispute in both the writ petitions are linked by chronological events and are in continuation of certain events which were made the subject matter of earlier petitions, hence, both the petitions were heard together and are being decided by this common judgment.

4. In order to appreciate the controversy giving rise to the instant

petitions, it will be necessary to notice certain background events which also includes previous litigation for comprehensive and clear understanding of the facts and disputes involved in the present petitions.

(A) Background Facts

5. Historically, Arya Samaj was founded by Swami Dayanand Saraswati in the year 1875 with the prime objective to promote social, spiritual, cultural upliftment of the society. The aforesaid Arya Samaj has a four tier composition namely (i) Sarvadeshik Arya Pratinidi Sabha (ii) Pradeshik Arya Pratinidhi Sabha (iii) Zila Arya Pratinidhi Sabha (iv) Arya Samaj Units.

6. The Arya Pratinidh Sabha was formed in the State of Uttar Pradesh on 03.07.1987 and was duly registered under the provisions of the Societies Registration Act, 1860. The Arya Pratinidh Sabha has its own registered bye-laws which regulates and governs the functioning of the Society. The bye-laws also define the constitution of the Arya Pratinidh Sabha and further indicates the powers and duties of the General Body, the Governing Body as well as the office bearers of the Governing Body. The registered office of Arya Pratinidhi Sabha is situate at Narayan Swami Ashram at 5 Meera Bai Marg, Lucknow. The said Society has been renewed from time to time and it was last renewed on 10.10.2015 for a period of five years.

7. There are approximately 300 units of Arya Samaj spread over the various districts within the State of Uttar Pradesh which constitutes the electoral units of the Arya Pratinidh Sabha to elect its general body. It has been stated that at present that there are approx 1300 members in the General Body of the Society. The General Body of the Arya Pratinidh Sabha elects its own Governining body which is known as 'Antrang Sabha'. It is also stated that the Sarvadeshik Arya Pratinidhi Sabha at New Delhi has its own rules which are known as Rules-Sub Rules of Arya Samaj. The aforesaid rules are binding over every Arya Samaj Unit which is affiliated with the Pradeshik Arya Pratinidhi Sabha.

8. It is in this backdrop where the aforesaid society has an old existence and covers various districts of the State of Uttar Prdesh having large number of persons as members who inturn elect and form its Governing Body, hence, it becomes a fertile ground for dissension and disputes which occur and from time to time and there has been several litigations, which has invited the attention of various authorities including the Courts relating to the Arya Pratinidhi Sabhas.

9. However, for the present controversy, it would be relevant to notice that the last undisputed elections of the Arya Pratinidhi Sabha, U.P. was held on 27.03.2016. The term of the said Committee or the Governing Body was 5 years and was to expire in the year 2021. In the aforesaid election held on 27.03.2016, a Governing Body of 90 members was constituted wherein Sri Devendra Pal Verma (the petitioner no. 2 in W.P. No. 4515 (MS) of 2020 was elected as the President while Dr. Dheeraj Singh was elected as Up Pradhan (Vice President), who is the petitioner of W.P. No. 9735 (MS) of 2020.

10. Soon after the aforesaid elections took place, on account of certain charges

levelled against Sri Devendra Pal Verma, the Deputy Registrar, Firms Societies and Chits by means of his order dated 09.11.2016 restrained Sri Devendra Pal Verma from performing his duties as the President of Arya Pratinidhi Sabha and by the same order the charge of the President was handed over to the petitioner of the W.P. No. 9735 (MS) of 2020 Dr. Dhiraj Singh.

11. Initially, Sri Devendra Pal Verma assailed the said order before the High Court at Allahabad. The High Court at Allahabad finding that the petition was not maintainable on account of lack of territorial jurisdiction, hence, dismissed the petition by means of order dated 24.03.2017 passed in W.P. (C) No. 59067 of 2016 and liberty was granted to Sri Devendra Pal Verma to approach the appropriate Court at Lucknow.

12. It is thereafter that Sri Devendra Pal Verma preferred a writ petition before this Court at Lucknow bearing W.P. No. 10563 (MS) of 2017.

13. In the meantime, the Deputy Registrar, Firms, Societies and Chits passed an order dated 16.01.2017 whereby the charge which was given to Dr. Dhiraj Singh was modified as a result the charge was now directed to be given to Smt. Gayatri Dixit (another Up Pradhan who was at serial No. 2). It will be worthwhile to notice that as per the bye-laws, the 90 members Committee of Arya Pratinidh Sabha including 16 office bearers comprises of one President, a Secretary, a Treasurar, a Librarian, 5 Up Pradhans (Vice President) and 5 Deputy Secretaries (Up Mantri) and one female Up Pradhan and one female Deputy Secretary and a female Assistant Treasurar and an Assistant Librarian.

14. It is in this backdrop, Dr. Dhiraj Singh preferred a Writ Petition bearing No. 1829 (MS) of 2017 wherein he assailed the order dated 16.01.2017 bye means of which the charge of the Pradhan which was given to him was directed to be handed over now to Smt. Gayatri Dixit.

15. During this period, another interesting event took place, inasmuch as, the General Body of the Arya Pratinidh Sabha by means of its Resolution dated 26.03.2017 expelled Sri Devendra Pal Verma from the post of as well as from the membership of the Society for a period of 6 years for various irregularities and actions of Sri Verma which were not in the interest of the Society.

16. Sri Devendra Pal Verma preferred a complaint before the Deputy Registrar, Firms Societies and Chits against the said Resolution dated 26.03.2017 regarding his expulsion from the membership of the Society upon which the Deputy Registrar by means of its order dated 30.03.2017 stayed the proceedings and the resolution dated 26.03.2017.

17. Dr. Dhiraj Singh preferred another writ petition assailing the order passed by the Deputy Registrar dated 30.03.2017 staying the resolution dated 26.03.2017 by which Devendra Pal Verma was expelled, by means of writ petition No. 7613 (MS) of 2017.

18. Again in a meeting of the Governing Body held on 23.07.2017, the petitioner Dr. Dhiraj Singh was elected as Pradhan for the remaining term up to 26.03.2021 and in the same meeting the membership of Smt. Gayatri Dixit was also terminated on the ground that she was

ineligible for membership in terms of Clause 2 (e) (b) (1) and (2) of the bye-laws.

19. Smt. Gayatri Dixit also file a complaint dated 25.07.2019 before the Deputy Registrar against the decision terminating her membership taken by the Governing Body in the meeting held on 23.07.2017.

20. Thus, three writ petitions were actively engaging the attention of this Court relating to the disputes as mentioned in the foregoing paragraphs.

21. All the three petitions bearing W.P. No. No. 1829 (MS) of 2017, W.P. No. 10563 (MS) of 2017 and W.P. No. 7613 (MS) of 2017 were clubbed together and decided by means of order dated 30.07.2019. As a result, the orders impugned in the aforesaid three writ petitions were set aside and the matter was remitted to the Deputy Registrar, Firm Socities and Chits to decide the matter afresh and till such decisions, the parties were directed to maintain status-quo. The relevant portion of the said order dated 30.07.2019 passed by this Court on the three clubbed petitions, is being reproduced hereinafter.

"4. So far as impugned orders dated 09.11.2016, 16.01.2017and 30.03.2017 are concerned, counsels for both the parties agree that the aforesaid order may be set aside. However, the issue as to whether Sri Devendra Pal Verma is entitled to hold any post in the society or not be left to be reproduced decided after decision of the Deputy Registrar with regard to reproduced membership.

5. In view of aforesaid, following order is being passed:-

(i) The impugned orders dated 09.11.2016, 16.01.2017 and 30.03.2017 are set aside.

(ii) All the parties may approach the Deputy Registrar, Firms, Societies and Chits, Lucknow within a period of two week from today raising all their submissions including with regard to membership of Sri Devendra Pal Verma and Smt. Gaytri Dixit. The said matters shall be decided by the Deputy Registrar by a reasoned and speaking order, in accordance with law, after hearing all the parties concerned, within a period of two months from the date a certified copy of this order is placed before him.

(iii) It is provided that authority of Sri Devendra Pal Verma to hold any post including the post of president in the society will depend upon the final order passed by the Deputy Registrar, Firms, Societies and Chits, Lucknow with regard to membership.

(iv) Till final decision of the Deputy Registrar, parties shall maintain status-quo.

6. With the aforesaid, all these writ petitions are disposed of."

22. In furtherance and as per the directions given by this Court in its judgment dated 30.07.2019, the Deputy Registrar called upon the parties concerned to file their respective pleadings and submissions.

23. While the matter was still pending before the Deputy Registrar, in the meantime, the elected Secretary of the Society namley Swami Dharmeshwaranand Saraswati expired on 23.10.2019.

24. Soon thereafter, the Deputy Registrar after considering the submissions and the pleadings of the respective parties passed its final order dated 02.11.2019. By means of the said order, the Deputy Registrar, Firms Socities and Chits, did not

find any error in the Resolution expelling Sri Devendra Pal Verma from the membership. It also noted that Smt. Gayatri Dixit had already submitted that her termination has already been recalled, thus, no further adjudication was required on her representation/complaint, hence, in effect the order dated 02.11.2019 primarily focussed on the issue of the expulsion of Sri Devendra Pal Verma and the same was upheld by the Deputy Registrar.

25. Sri Devendra Pal Verma assailed the said order dated 02.11.2019 by means of W.P. No. 4515 (MS) of 2020 which is before this Court at present under adjudication. He also assailed the consequential order dated 07.11.2019 whereby the list of office bearers as submitted by Dr. Dhiraj Singh was registered by the Deputy Registrar. Thus, it would be seen that one arm of litigation before this Court is in relation to the expulsion of Devendra Pal Verma and the validity of the order dated 02.11.2019 and consequential registration of the list of members vide order dated 07.11.2019 which is the subject matter of W.P. No. 4515 (MS) of 2020.

26. The controversy involved in W.P. No. 9735 (MS) of 2020 filed by Dr. Dhiraj Singh, orginates from the events mentioned hereinafter.

27. As already noticed above, the Secretary namely Swami Dharmeshwaranand Saraswati had expired on 23.10.2019 and as per the meeting of the Society held on 23.07.2017 Dr. Dhiraj Singh was elected as the President for the remaining term. Thus, since this Court while passing the order dated 30.07.2019 in the connected 3 petitions had directed the respective parties to maintain status-quo till the decision was rendered by the Deputy Registrar, Socities Chits and Funds, hence, once the order dated 02.11.2019 was passed, Dr. Dhiraj Singh in capacity as the President had submitted a list of 90 members before the Deputy Registrar for the year 2019-20 which was registered on 07.11.2019.

28. Dr. Dhiraj Singh in capacity as President circulated an agenda calling for the meeting of the Society to be conveyed on 01.12.2019 primarily to fill up the post of the Secretary of the Society which had fallen vacant on account of death of Sri Dharmeshwara Nand Saraswati.

29. The meeting of the Governing Body was held on 01.12.2019, however, no business was transacted and after offering due condolences on account of demise of late Sri Dharmeshwaranand Saraswati, the meeting of the Governing Body was adjourned for 15.12.2019.

30. In the meeting held on 15.12.2019 for the purposes of filling up the vacancy of the Secretary, the names of the Deputy Secretaties were discussed. Sri Vishal Singh (respondent no. 4) in W.P. No. 9735 (MS) of 2020, his name was at Serial No. 1 amongst the Deputy Secretary and was considered first, however, certain objections were raised and it was stated that since Sri Vishal Singh was holding the post of Medical Officer (District Tuberclosis Officer) in District Jaunpur which is a responsible post in the Government of Uttar Pradesh, hence, as per Rule 16 of Uttar Pradesh Government Servant Conduct Rules, 1956, the respondent no. 4 Vishal Singh was not suitable for being appointed as the Secretary. The Society also sought a legal opinion and thereafter considering the various aspects, Sri Vishal

Singh was not found suitable by the majority. Thereafter the next eligible Deputy Secretary namely Sri Gyanendra Singh his candidature was discussed and by majority he was found suitable and nominated as the Secretary of the Society.

31. The nomination of Sri Gyanendra Singh as Secretary of the Society was duly ratified by the other office bearers including the Treasurar and the President. The said Resolution was also communicated to the Bank where the Society held its accounts attesting the signatures of Sri Gyanendra Singh. The nomination of Sri Gyanendra Singh as Secretary was also duly published in the Hindi weekly newspaper "Arya Mitra" published by the Arya Pratinidhi Sabha for wide circulation and information to all members and persons concerned.

32. On 28.12.2019, the petitioner Dr. Dhiraj Singh also sent a copy of the Minutes of the meeting dated 15.12.2019, the agenda dated 05.11.2019 as well as information regarding nomination of Sri Gyanendra Singh as the Secretary of the Society to the Deputy Registrar.

33. It is in this backdrop that Sri Vishal Singh who himself was otherwise present in the meeting dated 15.12.2019 and was well aware of the nomination of Sri Gyanendra Singh as the Secretary of the Society yet he made a representation before the Deputy Registrar on 03.01.2020 raising a question mark on the alleged meeting dated 01.12.2019, 15.12.2019 as well as the agenda dated 05.11.2019 issued by Dr. Dhiraj Singh.

34. Sri Vishal Singh in his representation/complaint dated 03.01.2020 depicted himself as the Officiating Secretary of the Arya Pratinidhi Sabha. It was alleged by him that though he was the Deputy Secretary but upon the death of Sri Dharmeshwaranand Saraswati, he automatically became the officiating Secretary of the Society, hence, the entire proceedings initiated by the meeting dated 01.12.2019, 15.12.2019 as well as the Agenda dated 05.11.2019 issued by Dr. Dhiraj Singh was unlawful and void.

35. Sri Vishal Singh also complained to the Deputy Registrar that upon the death of Sri Dharmeshwaranand Saraswati, the post of Secretary was lying vacant and as such directions be issued for calling upon a meeting for filling up the post of the Secretary in due accordance with the rules and bye-laws of the Society.

36. Upon the representation/complaint of Sri Vishal Singh, the Deputy Registrar passed an order dated 09.01.2020 addressed to Dr. Dhiraj Singh and directed him to call for a meeting of the "Antrang Sabha" of Arya Pratinidhi Sabha and fill the post of Secretary in accordance with the bye-laws and within 15 days inform the Deputy Registrar of it.

37. Dr. Dhiraj Singh upon receiving the said notice/order dated 09.01.2020 submitted a detailed reply before the Deputy Registrar on 17.01.2020 informing him of the entire exercise undertaken for nominating the Secretary and that Sri Gyanendra Singh had already been appointed as the Secretary. It was also informed that the minutes of the meeting and other relevant documents were already submitted before the Deputy Registrar on 28.12.2019. It was also stated that Sri Vishal Singh who had attended the meeting dated 15.12.2019 wherein his candidature was considered but as the majority found

him unsuitable as he was holding a post with the State Government, hence, all these facts had been concealed by Sri Vishal Singh and he has mislead the Deputy Registrar to issue the said order dated 09.01.2020. In the aforesaid, it was prayed that the order dated 09.01.2020 be recalled.

38. In this backdrop where there was an attempt by Vishal Singh to disrupt of the Governing Body, on 28.01.2020 it is alleged that while the President Sri Dhiraj Singh and Secretary Gyanendra Singh were out of station, Sri Vishal Singh along with 7 -8 other persons forcibly dismantled the nameplate of the Secretary affixed on the office of the Secretary and interfered with the functioning of the Society.

39. Sri Vishal Singh in his alleged attempt to usurp control of the Society moved another representation/complaint before the Deputy Registrar alleging that the meeting called by Dr. Dhiraj Singh as President on 01.12.2019, 15.12.2019, 02.02.2020 and 14.03.2020 were void and impermisible and the same may not be accepted or given effect to. Sri Vishal Singh levelled various allegations against Dr. Dhiraj Singh that few members and office bearers had also filed affidavits raising a no confidence motion against Dr. Dhiraj Singh and a meeting of the Governing Body be called, to be supervised by the Deputy Registrar, Firms Societies and Chits.

40. Once the Deputy Registrar received complaint dated 31.01.2020, he issued another letter to the petitioner Dr. Dhiraj Singh on 01.02.2020 calling upon Dr. Dhiraj Singh to submit his reply (Annexure No. 23 with the writ petition bearing No. 9735 (MS) of 2020).

41. It is further alleged by the petitioner Sri Dhiraj Singh that in the meeting dated 02.02.2020 vide Resolution No. 11 Sri Vishal Singh was expelled from the membership as well as from the post of Deputy Secretary. It is further alleged that Sri Vishal Singh did not challenge the said decision dated 02.02.2020 regarding his expulsion, however, in order to browbeat, he issued an illegal agenda on 03.02.2020 while ante-dating the same to 30.01.2020 for convening a meeting on 16.02.2020 at the head office of the Society at Lucknow mainly for considering the No Confindence Motion against the petitioner Dr. Dhiraj Singh and also for filling up the vacancy for the post of Secretary.

42. As in the alleged meeting dated 02.02.2020 the Governing Body of the Society had expelled Sri Vishal Singh, hence, Dr. Dhiraj Singh also sent another amended list of members to the Deputy Registrar on 05.02.2020. Sri Vishal Singh by means of his letter dated 14.02.2020 addressed to the Registrar sought an Observer for supervising the alleged meeting slated for 16.02.2020. The Registrar, Firms Socities and Chits by means of his order dated 14.02.2020 and addressed to the Assistant Registrar required the Assistant Registrar to do the needful for appointing an Observer for the meeting dated 16.02.2020. In furtherance thereof the Deputy Registrar informed the Registrar that as per his request from Deputy Registrar, Faizabad, Deputy Registrar, Kanpur , Assistant Registar, Azamgarh and Assistant Registrar, Gorakhpur anyone may be appointed as the Observer.

43. Accordingly, the Assistant Registrar, Firms Societies and Chits, Azamgarh was appointed as Observer

under whose supervision the meeting dated 16.02.2020 was to be held.

44. It is this meeting dated 16.02.2020 which is in the eye of the storm. On one hand it is the case of the petitioner Dr. Dhiraj Singh that on the alleged date 16.02.2020 on account of commotion and ruckus created by the members at the behest of Sri Vishal Singh, the meeting could not take place, so much so, that the head office of the Society was locked by the police and the Observer so appointed also noticed the same while submitting its report to the Registrar that no meeting was held for the said reason.

45. On the other hand Sri Vishal Singh stated that the meeting took place on 16.02.2020 and a resolution was passed by means of which the President Dr. Dhiraj Singh was removed as the No Confidence Motion was passed successfully by the members.

46. It is in furtherance thereof that the alleged list of office bearers was submitted by Sri Vishal Singh before the Deputy Registrar on 17.03.2020 upon which the Deputy Registrar passed an order dated 19.03.2020 directing the said list to be registered.

47. It is this order dated 19.03.2020 which has been assailed by the petitioner Dr. Dhiraj Singh in W.P. No. 9735 (MS) of 2020 as well as the consequential order dated 20.03.2020 by means of which amended list of office bearers of the Governing Body of the Society has been registered for the year 2019-20. Thus, in light of the detailed facts noticed above the two writ petitions have been heard together and are being decided by this common judgment.

(B) Submissions of learned counsel for the parties.

48. The Court has heard Sri Gaurav Mehrotra, learned counsel for the petitioner in W.P. No. 9735 (MS) of 2020. Sri Abhishek Yadav, Advocate for Sri Vishal Singh, the respondent no. 4, Sri Sharad Pathak, learned counsel for Smt. Gayatri Dixit, respondent no. 5 and Dr. L.P. Mishra, learned Senior Counsel along with Sri Atul Dwivedi for Arya Pratinidhi Sabha, the respondent no. 7 as well as the learned Standing Counsel for the State-respondents.

Whereas in W.P. No. 4515 (MS) of 2020, the Court has heard Dr. L.P. Mishra learned Senior Counsel along with Atul Dwivedi, learned counsel for the petitioner, Sri Gaurav Mehrotra, learned counsel for Sri Dhiraj Singh, respondent no. 3 and the learned Standing Counsel for the State-respondents.

49. For the sake of convenience, the submissions in both the writ petitions are being noticed separately and W.P. No. 9735 (MS) of 2020 is being considered first:-

(I) W.P. No. 9735 (MS) of 2020:-

50. Dr. L.P. Mishra and Sri Atul Dwivedi, learned counsel appearing for Arya Pratinidhi Sabha has raised preliminary objections regarding the maintainbility of the above petition.

51. Dr. Mishra has urged that the petitioner Dhiraj Singh is neither a member of the Society nor an office bearer and he being a stranger is not entitled to file the above petition. It has been urged that the petitioner himself has stated that his

primary membership of Arya Samaj (Baldeo Ashram) Khurja, District Bulandshahr has been cancelled. It is further submitted that once the primary membership of Dhiraj Singh having been cancelled, he loses his right to remain as a member of the Arya Pratinidhi Sabha also he has been removed from the post of President in the meeting held on 16.02.2020. Thus, the petitioner has no locus to file the instant petition.

52. It is further submitted that Sri Dhiraj Singh himself has filed a Suit bearing R.S. No. 581 of 2020 before the Civil Judge, Junior Division, Khurja, District Bulandshahr challenging the membeship cancellation order dated 01.02.2020. In the said suit an order of status-quo has been passed, thus, once the membership of Sri Dhiraj Singh had been cancelled and the order of status-quo had been passed, accordingly, Sri Dhiraj Singh cannot assail the same order in two different forums and he having availed the remedy of filing a suit now cannot simultaneously maintain the above petition.

53. It is further stated that during the pendency of the instant petition, Sri Dhiraj Singh also moved an application before the Civil Judge, Junior Division, Khurja, District Bulandshahr and has withdrawn the suit No. 581 of 2020 which was dismissed as withdrawn without seeking liberty to file afresh by means of order dated 17.03.2021. Moreover, in the instant petition there is no challenge to the order dated 01.02.2020 regarding cancellation of the primary membership of Dhiraj Singh, hence, in the aforesaid backdrop, the petitioner Dhiraj Singh is estopped and cannot challenge the order dated 16.02.2020, accordingly, for all the aforesaid reasons, the petition deserves to be rejected. In respect of the aforesaid submission, the learned counsel for the respondent no. 7 relies upon the decision of the Apex Court in the case of ***Ayub Khan Noor Vs. State of Maharashtra*** reported in ***2013 Vol. (4) SCC 465.***

54. In furtherance of the aforesaid submission, it has also been urged that an individual member cannot maintain a writ petition and to buttress his aforesaid submissions, the learned counsel relies upon a Division Bench decision of this Court in the case of ***Umesh Chandra and Another Vs. Mahila Vidyalaya Society*** reported in ***2006 (24) LCD 1373***.

55. It has also been urged by Dr. Mishra that apart from the reasons mentioned above, the writ petition is also not maintainable as there is no resolution passed by the Society authorising the petitioner Dr. Dhiraj Singh to institute the above writ petition and for the said reason, the petition is not maintainable. In suport of his submission, he relies upon a Division Bench decision of this Court in the case of ***Umesh Chandra and Another Vs. Mahila Vidyalaya Society*** reported in ***2006 (24) LCD 1373***. and also on a decision in the case of ***Kalashi Das Shiksha Sansthan Vs. Regisrar Firms*** reported in ***2013 (31) LCD 1102.***

56. Apart from the aforesaid submissions, Dr. Mishra has further submitted that since the petition involves disputes questions of facts and Dr. Dhiraj Singh has an alternate remedy of preferring appropriate proceedings before the Civil Court, hence, for availability of an alternate remedy as well as the petition involving disputed questions of fact, this petition is not maintainable.

57. It has been submitted that during the pendency of the aforesaid petition, the

elections have been held on 21.03.2021, consequently, the instant petition has been rendered infrutuous and the petitioner Dhiraj Singh if at all aggrieved has an appropriate remedy of assailing the elections in terms of Section 25 (1) of the Socities Registration Act, 1860. Thus, for all the aforesaid reasons, the instant petition is not maintainable and is liable to be rejected at the outset.

58. Sri Gaurav Mehrotra, learned counsel appearing for Sri Dhiraj Singh has refuted the aforesaid arguments and has submitted that the petitioner does have the right to maintain the aforesaid petition. It has been submitted that the petitioner is individually and peronally aggrieved by the proceedings dated 16.02.2020 by means of which in a completely arbitrary and illegal manner, the petitioner has been shown to have been removed from the post of the President.

59. It has been submitted that the Deputy Registrar who is a functionary under the Societies Registration Act, 1860 had been informed of the chronology of events that transpired from time to time and the petitioner had also submitted his response as well as the representation indicating clearly that the grounds upon which Sri Vishal Singh, the respondent no. 4 had made complaints were completely untenable yet the same was not considered.

60. The Deputy Registrar while passing the impugned order dated 19.03.2020 has abdicated his functions as the order has been passed in an arbitrary fashion and is non-speaking one even without noticing the entire facts and has been passed without affording any opportunity of hearing which has rendered the order vulnerable to judicial interference.

61. In the aforesaid circumstances, the petitioner being aggrived does have a right to assail the said order and in support of his submissions the learned counsel has relied upon the decision of this Court in the case of ***Jagdimbaka Prasad Pandey Vs. State of U.P. and Others*** reported in ***2019 (8) ADJ 536***. He has also relied upon a Division Bench decision of this Court in the case of ***Banwari Lal Kanchal Vs. Bhartendu Agarwal and Others*** reported in ***2019 (12) ADJ 235 (DB) (LB).***

62. Sri Mehrtora has further submitted that as far as the order dated 01.02.2020 regarding cancellation of the primary membership is concerned, the same is ex-facie illegal. It has been submitted that the alleged Authority namely Prantiya Nyay Sabha who is said to have passed the order has no authority or jurisdiction to do so. It has been submitted that Rule 37 of the bye-laws of the Arya Pratinidhi Sabha deals with the power and authority of the Prantiya Nyay Sabha. Limited scope of the Authority is exercised by the Prantiya Nyay Sabha and unless and until a dispute which is envisaged in terms of Rule 37 exists only such disputes can be decided and any order which is beyond the scope of Rule 37 of the bye-laws amounts to an order being completely de-hors of the said rule and is an exercise of power by an authority which has none rendering such an order completely non-est, void-ab-nitio and for the said reason the said order has no legal consequence and apparently it is liable to be ignored.

63. Sri Gaurav Mehrotra further submits that even the suit instituted by the petitioner has been withdrawn as the petitioner realised that the order dated 01.02.2020 passed by the alleged Prantiya Nyay Sabha was non-est and without jurisdiction. He further submits that the apex

body of Arya Pratinidhi Sabha i.e. Sarvadeshi Arya Pratinidhi Sabha which has its office in New Delhi and has framed the Rules and Constitution for the Arya Samaj also considering the matter issued a letter clearly holding that the Nyay Sabha did not have the jurisdiction or the Authority to remove a person from the membership and thus in light of the above, there was no purpose of keeping the aforesaid suit pending before the Civil Court, accordingly, in the aforesaid backdrop of facts the said suit was withdrawn which in any case cannot prevent the petitioner to exercise his right of moving the Constittutional Court for redressal of his grievance expecially where an order passed by a quasi-judicial authority performing an adjudicatory role is violative of Article 14 of the Constitution of India and moreover, it has evil consequence for the petitioner, hence, such an order can be assailed and the petitioner being aggrieved has a right to maintain the above petition.

64. Sri Mehrotra has further submitted that the order passed by the Deputy Registrar dated 19.03.2020 is completely bereft of reasons, it also does not consider the facts and the material which was before the Authority prior to taking the decisions and in any case it is in gross violation of the provisions especially the proviso contained in Section 4 and also of Section 4-B of the Societies Registration Act, 1860, and has been passed without providing an opportunity of hearing to the petitioner. Thus, for the aforesaid reasons, neither the bar of alternate remedy could come in the way of this Court to entertain and consider the petition on merits as the order is violative of principles of natural justice and completely non-speaking.

65. Sri Mehrotra further submits that there has been merely a bald allegation regarding fresh elections having taken place whereas there is no material or details brought on record to substantiate the same.

66. Sri Mehrotra also submitted that at the time when the aforesaid petition was filed, this Court on 06.07.2019 had passed a detailed order by means of which the instant petition was directed to be connected with W.P. No. 4515 (MS) of 2020 and W.P. No. 7217 (MS) of 2020.

67. Significantly, it will be relevant to mention here that two other writ petitions bearing W.P. No 7217 (MS) of 2020 and W.P. No. 12501 (MS) of 2020 were also filed assailing the said order. Both the aforesaid writ petitions were withdrawn by the respecitve petitioners and were so dismissed as withdrawn by the Court by means of order dated 18.03.2021 and 23.03.2021 respectively.

68. From the perusal of the said order dated 06.07.2019, it would indicate that the preliminary objections urged at this stage were also raised at that time. Considering the aforesaid this Court had also directed the Additional Chief Standing Counsel to seek complete instructions and assist the Court on the aforesaid issues whether the petitioner (Dhiraj Singh) was heard before passing the impugned order i.e. 19.03.2020.

69. Sri Mehrotra has further submitted that on 09.07.2020, this Court has after noticing the submissions of the respective parties, issued notices to the private respondents nos. 6 and 7 and also directed the opposite party no. 3 i.e. the Deputy Registrar to file the counter affidvit and shall also give a reply to the query made in the order dated 06.07.2019. It is further submitted that despite the matter having been listed on various occasions yet no counter affidavit was filed by any of the

contesting parties. Even on 03.12.2020 time was granted to the respondents to file their counter affidavit but the same was not filed. It is only as late as on 18.03.2021 that the respondent no. 7 i.e. the Society filed its counter affidavit.

70. It is also submitted that, while filing the said counter affidavit no material has been brought on record to substantiate the factum of the alleged elections which has been mentioned during the course of the arguments but not stated in the counter affidavit. Thus, if any alleged elections had taken place then it was the duty of the Society while filing the counter affidavit as late as on 18.03.2021 to bring the said facts on record. Making a submission in absence of any pleadings amounts to deliberate suppression, concealment of material facts and for the said reason also the aforesaid objections raised by the respondents deserves to be rejected.

71. Sri Mehrotra further urged that even otherwise the entire case is built on the alleged meeting said to have taken place on 16.02.2020. It is on the application of Sri Vishal Singh addressed to the Registrar that an Observer was appointed. The Observer has furnished its report to indicate that no meeting took place on 16.02.2020 on account of ruckus created. Thus, without calling for the report from the Observer and without verifying the said facts, the impugned order has been passed which is suceptible for interference. On one hand the Observer is appointed by the Registrar to oversee the meeting whereas even without noticing and considering the facts and even without calling for a report from the Observer, the Minutes of an alleged meeting said to have been held on 16.02.2020 has been accepted by the Deputy Registrar. This is nothing but absolute arbitrariness and caprice and such an order which is passed on whims cannot sustain judicial scrutiny. For the aforesaid reasons, the impugned orders are liable to be set aside and the writ petition deserves to be allowed.

(II) Writ Petition No. 4515 (MS) of 2020.

72. In the aforesaid petition, Sri Gaurav Mehrotra has raised preliminary objections to the effect that the present writ petition has been preferred by Arya Pratinidhi Sabha and Sri Devendra Pal Verma as petitioner no. 2 where as the membership of petitioner no. 2 has been cancelled. The issue of membership has been adjudicated by the Deputy Registrar and the said order is not assailable and the same can be assailed before the Civil Court. Moreover, since Devendra Pal Verma has impleaded the Society as petitioner no. 1 through its President but there is no material on record to indicate that the Society has issued any authorization to the petitioner no. 2 to institute the above petition, thus, for the said reason, the petition at the behest of Sri Devendra Pal Verma is not maintainable nor can he represent or institute the petition at the behest of the Society i.e. petitioner no. 1.

73. It has further beens submitted that in the instant case despite ample opportunity having been granted, no rejoinder affidavit was filed except as late as on 18.03.2021. Even in the aforesaid rejoinder, no effort has been made to bring any resolution on record by which Sri Devendra Pal Verma has been authorized to file the above petition.

74. In absence of any authorization and knowing the fact that Sri Devendra Pal Verma is not a president as the issue has been adjudicated by the Deputy Registrar

while passing the order dated 02.11.2019 yet while filing the aforesaid petition Sri Devendra Pal Verma has impleaded the Society as petitioner no. 1 and has represented the Society as its Pradhan. On the date of institution of the petition, the petitioner is not the Pradhan and thus, the petition suffers from misrepresentation, accordingly, the same is not maintainable.

75. It is also urged that the order passed by the Deputy Registrar is reasoned and considering all the material submitted before him. There is a clear finding recorded by the Deputy Registrar that no material could be brought on record by Sri Devendra Pal Verma to substantiate that the order regarding his removal and termination of his membership suffers from any vice. Such an order which is based on material before it as well as the fact that the order has been passed after affording full opportunity of hearing cannot be challenged. The High Court does not exercise appellate powers rather the said order if at all can be assailabled within the scope of powers conferred on this Court of judicial review, where this Court does not substitute its own finding rather the inquiry is limited to the decision making process and not the merits of the decision itself hence for the said reason also the impugned order also does not fall within the parameters nor any circumstances have been urged to indicate that the order has been passed in violation of principles of natural justice, thus, the petition is not maintainable and deserves to be dismissed.

76. Dr. L.P. Mishra and Sri Atul Dwivedi refuting the aforesaid submissions on behalf of the petitioners have urged that the order dated 02.11.2019 passed by the Deputy Registrar has the effect of confirming the removal of the the petitioner and such an order which affects the personal right of the petitioner can be assailed by him. It is further urged that though it is true that no resolution has been passed by the Society authorizing the petitioner no. 2 i.e. Devendra Pal Verma to institute the above petition but nevertheless the petition is maintainable at least at the behest of petitioner no. 2. Thus, the same can be considered by the Court and cannot be dismissed for such defect at the threshhold.

77. Dr. Mishra has stated that in paragraph 10 to 14 of the rejoinder affidavit filed by the petitioner dated 18.03.2021 it has been stated that the alleged resolution by which the membership of the petitioner no. 2 Sri Devendra Pal Verma was cancelled, the said resolution has been recalled by the competent authority i.e. Arya Samaj, Muzaffarnagar in its meeting dated 19.07.2020 and consequently the Arya Pratinidhi Sabha on 26.09.2020 issued a letter addressed to the Administrator of Arya Samaj, Muzaffarnagar accepting the Minutes of meeting dated 19.07.2020 and holding that Sri Devendra Pal Verma alongwith two other members are the members of the Arya Samaj, Muzaffarnagar. Thus, for the said reason and subsequent event, the impugned order looses much of its relevance and is liable to be set aside.

(C) Points for Determination:-

78. This Court after hearing the parties at length and on perusal of the material available on record, for the sake of convenience formulates the following points for determination which arise in the aforesaid two writ petitions.

(i) Whether Sri Dhiraj Singh has the right to maintain the W.P. No. 9735 (MS) of 2020 ; (ii) Whether the W.P. No. 9735 (MS) of 2020 is not maintainable for

availability of alternate remedy and involving disputed questions of facts ; (iii) Whether the impugned order dated 19.03.2020 passed by the Deputy Registrar is arbitrary and has been passed without affording opportunity of hearing and is violative of principles of natural justice.

(iv) Whether Devendra Pal Verma has the right to maintain W.P. No. 4515 (MS) of 2020 projecting himself to be the Pradhan and without having any authorization from the Society to institute the writ petition; (v) Whether Sri Devendra Pal Verma has the locus to maintain the W.P. No. 4515 (MS) of 2020 in his individual capacity as petitioner no. 2. (vi) Whether the impugned order dated 02.11.2019 suffers from any vice and is in violation of principles of natural justice and is liable to be set aside in exercise of powers of judicial review.

(D) *Discussions and Analysis of legal issues:-*

79. This Court is taking up the issues involved for determination in W.P. No. 9735 (MS) of 2020 first.

80. It will be necessary to first consider whether the writ petition is maintainable at the behest of Sri Dhiraj Singh. While raising the aforesaid issue of maintainability at the behest of respondent no. 7. Dr. Mishra along with Atul Dwivedi, learned counsel have submitted that now it is well settled that an individual member is not authorized to take up the cause of the Society unless he is so authorized. Relying upon the Division Bench decision of this Court in the case of ***Umesh Chandra (supra)*** where it has been held that an individual member has no right to represent or take the cause of the Society unless it is authorised by its Governing Body.

82. As far as the proposition is concerned, the same is not in dispute but it is equally true that in the instant case, the petitioner has preferred the instant petition in his capacity as an individual member and has not taken up the cause of the Society of its Governing Body as a whole as such he is assailing the order by means of which his personal rights which were conferred have been affected.

83. In this regard, the decision cited by the learned counsel for the petitioner in the case of ***Jagdimbaka Prasad Pandey (Supra)*** is more apt where it has considered this issue. The coordinate Bench of this Court in the case of ***Jagdimbaka Prasad Pandey (supra)*** after noticing the various arguments of the parties specifically formulated the questions before it and after considering the various decisions including the case of Umesh Chandra (supra) has held that where an individual is aggrieved by an action of Authorities such individual has the right to approach the Court in writ jurisdiction. The relevant paragraph nos. 33 and 36 of the said case is being reproduced for ready reference:-

"33. With regard to the arguments regarding maintainability of the writ petition on behalf of the petitioners, this Court has perused the judgment rendered by the Division Bench in Ratan Kumar Solanki Vs. State of U.P. and Others reported in 2010 (1) ADJ 262. This Court finds that after considering two Division Bench judgments rendered in Dr. P.P. Rastogi Vs. Meerut University and Others reported in 1997 (1) U.P.L.B.E.C. 415 and Umesh Chandra Vs. Mahila Vidyalaya and others as well as two Single Judges' decisions in Smt. Vimla Devi Vs. Dy. Director of Education, Agra Region, Agra, reported in 1997 (3) ACC 1807 and

Bhagwati Vs. State of U.P. and Others reported in 2006 (2) ADJ 361; the Division Bench observed that a writ petition at the instance of an individual member of the Society would be maintainable, since, recognition of illegally constituted committee affects the democratic rights of the individual Member of the Society and his Fundamental Right to form an association. The Division Bench observed that no doubt it is true that an individual Member cannot represent the Committee of Management and challenge the order or action of any Authorities whereby the Committee of Management is allegedly affected and if an action or order affects the Committee of Management, the Collective Body, the Body itself can challenge the same or may authorize an individual to represent it and to challenge such an action or order of the Authorities. However, where the individual is aggrieved by an action of the Authorities, such individual has locus-standi, to approach this Court in Writ jurisdiction.

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.....36. This Court hence finds that the writ petitions filed by the objectors are maintainable on the question of the locus-standi. With regard to the other preliminary objections raised by the learned counsel for the respondent no.6, of maintainability of the writ petition in view of alternative/statutory remedy being available by filing a civil suit, this Court also finds that the order impugned having been passed in violation of Principle of Natural Justice can also be challenged by the individual members of the Society like the petitioners who are adversely affected. The judgments referred to by the learned counsel for the respondent Ayaaubkhan Noorkhan Pathan Vs. State of Maharashtra & Others reported in 2012 (30) LCD 2550 and Nishant Kumar Pandey Vs. Uco Bank & Others reported in 2014 (32) LCD 48, both have referred to the issue of judicially enforceable right being available on the basis of which writ petition can be filed and maintained. It has been observed that if a person approaching the Court can satisfy that the impugned action is likely to adversely affect his rights which have been shown to have their source in statutory provisions such a writ petition cannot be rejected on grounds of locus-standi. A member of the General Body cannot be permitted to suffer at the hands of the Committee of Management or the Authorized Controller or authorities under the Societies Registration Act for their inaction, and thereby be rendered a mere spectator in the mismanagement of the Society. "

84. The said issue was also noticed by a Division Bench of this Court in the case of ***Banwari Lal Kanchan (Supra)*** wherein an argument was raised that though the decision of ***Ratan Kumar Sirohi Vs. State of U.P. and Others*** reported in ***2010 (1) ADJ 262*** has been noticed by the Court but certain paragraphs of the same judgment have been ignored. The aforesaid issue was raised in context with the fact whether an individual member has the right to assail the elections and maintain a writ petition. The said issue was noticed by the Court and the Division Bench in ***Banwari Lal Kanchal (Supra)*** held that it was in agreement with the judgment passed by the learned Single Judge relying upon the decision of ***Ratan Kumar Sirohi (supra)*** and also clarified that a petition by a member which has evil consequences can be entertained by this Court.

85. There is another angle to the aforesaid matter. The record would indicate

that the Deputy Registrar by means of his letter dated 09.01.2020 had referred to the complaint made by Sri Vishal Singh and had called upon the petitioner Sri Dhiraj Singh treating him as the Acting President of Arya Pratinidhi Sabha to hold the meeting in accordance with the bye-laws of the Society for filling up the vacancy occurred on death of Sri Dharmeshwaranand Saraswati and inform the Deputy Registrar within 15 days (annexure No. 17) in W.P. No. 9735 (MS) of 2020.

86. In response thereto the petitioner had submitted his detailed reply on 17.01.2020 (annexure No. 18) of W.P. No. 9735 (MS) of 2020. The aforesaid material was available in the office of the Sub Registrar, coupled with the fact that the Deputy Registrar again by means of his letter dated 01.02.2020(annexure no. 23) had referred to certain disputes and complaints made by Sri Vishal Singh and further mentioned that no decision has been taken by the Deputy Registrar yet and in reply thereto the petitioner has submitted the Minutes of meeting informing the Deputy Registrar that Sri Vishal Singh had been removed in the meeting held on 02.02.2020.

87. This reflects that, there was serious disputes before the Deputy Registrar regarding the locus of Sri Vishal Singh to raise the complaint and to project himself as the Officiating Secretary. Even the resolution regarding the removal of Sri Vishal Singh was also before the Deputy Registrar but surprisingly from the perusal of the impugned order, it would indicate that there is no such reference to any of such correspondences or the chain of events leading up to the alleged meeting dated 16.02.2020 which is the bone of contention.

88. Regarding the submission, whether the instant petition is not maintainable for availability of alternate remedy and that it involves disputed questions of facts. It has been urged by the responents that even before passing of the impugned order dated 19.03.2020, the petitioner Dhiraj Singh had already been removed from the primary membership by means of order dated 01.02.2020. The said order was assailed by Sri Dhiraj Singh by filing a suit before the Civil Court at Khurja, District Bulandshahr bearing No. 581 of 2020 and the Court by means of order dated 28.02.2020 had directed the parties to maintain status-quo, thus, having assailed the removal order before the competent Civil Court, the petitioner is not entitled to maintain the above petition.

89. Refuting the aforesaid submissions, it has been urged that the order of removal has been passed by a Prantiya Nyay Sabha, a copy of the said order has been brought on record as Annexure No. 37 with the writ petition. It has been urged by the learned counsel for the petitioner that the said order has been passed by an authority which has no jurisdiction, inasmuch as, only such disputes can be adjudicated by the Prantiya Nyay Sabha which come within the abmit of Rule 37 of the bye-laws of the Society. It has also been submitted that from the perusal of Rule 37 of the bye-laws, it would indicate that only such disputes can be considered by the Nyay Sabha which relate to any dispute or difference between the Arya Samaj affiliation to the Prantiya Arya Pratinidhi Sabha and all disputes and differences between the members of the

Prantiya Arya Pratinidhi Sabha relating to the matters concerning or connected with the affairs of such Pratinidhi Sabha.

90. The Prantiya Nyay Sabha is also entitled to hear the appeals from a decision of Sthaniya Nyay Sabha under its territorial jurisdiction. Nonetheless, It is only the Antrang Sabha which can suspend its member and its General Body can expell the member if he or she acts in controvention of the aims or objects of the constitutionof the Arya Samaj. Accordingly, it has been urged that the order of removal is against the provision and the bye-laws, hence, the same will not impact the rights of the petitioner to have assailed the same and moreover upon having realised that the said order of removal dated 01.02.2020 was without jurisdiction. The petitioner has already withdrawn the said civil suit. Moreover, the issue is not before the Court, inasmuch as, it is only the impugned order dated 19.03.2020 which is before the Court and the said order needless to say has been passed without affording any opportunity of hearing, hence, is liable to be set aside.

91. The Court has considered the submissions and finds that alternate remedy is not an absolute bar for this Court to exercise its jurisdiction, though, the petitioner may have instituted the civil suit assailing the order dated 01.02.2020 regarding his removal but in the instant case as it is not disputed that that the petitioner has already withdrawn the civil suit. Even the issue whether the petitioner has rightly or wrongly been removed is a matter which has to be considered by the appropriate Authority and this Court refrains from entering into the said controversy as it may adversely affects the rights of either of the parties.

92. Prima facie, from the perusal of Rule 37 of the bye-laws which relates to the Prantiya Nyay Sabha indicates that limited type of disputes can be adjudicated by it which in any case at the first blush does not include the power to suspend, expel any member.

93. Once, the Civil Suit has been withdrawn and the order under challenge is not the subject matter of the erstwhile suit, accordingly, this Court does not deem appropriate to dismiss the petition on such grounds, hence, the objection raised by the respondent no. 7 does not deserve any indulgence from this Court and the plea fails especially when the impugned order has been passed in violation of principles of natural justice as shall be evident hereinafter.

94. Now coming to the impugned order dated 19.03.2020 and upon considering the same in light of the rival submissions, it appears that the Deputy Registrar has not considered the controversy in its correct perspective nor it has noticed the entire facts before it.

95. This Court is also pained to note that a coordinate Bench of this Court while dealing with the matter as way back as on 06.07.2020 had required the State Counsel to seek instructions and assist the Court on the issue involved as well as to indicate whether the petitioner was heard before passing the impugned order and if according to the report of the Observer, no meeting took place on 16.03.2020 then how far the Deputy Registrar could rely upon the Minutes of the meeting produced by the contesting opposite parties.

96. Even by means of order dated 09.07.2020, time was granted to file the

counter affidavit which was again reiterated on 03.12.2020, despite the same no counter affidavit was filed. Though, the Society filed its counter affidavit on 18.03.2021 after the hearing had commenced but the State Counsel neither assisted the Court nor filed any counter affidavit and the Court had to proceed in absence thereof. In such circumstances, the averments in the writ petition and averments indicating various correspondence exchanged and submitted with the Deputy Registrar are being taken as not denied by the State Counsel.

97. The petitioner has clearly brought on record material to indicate that in terms of the order passed by this Court on 30.07.2019, the Deputy Registrar had passed an order on 02.11.2019. The order dated 02.11.2019 was assailed by Sri Devendra Pal Verma in other connected Petition No. 4515 (MS) of 2020, however, while the said petition was pending certain events took place, inasmuch, Sri Dhiraj Singh called for a meeting on 15.12.2019. In the said meeting Sri Gyanendra Singh was appointed as the Secretary (Annexure Nos. 11 and 12). The aforesaid information was given to the Deputy Registrar on 28.12.2019 (Annexure No. 15). It is only on 03.01.2020 that Sri Vishal Singh had raised disputes which was noticed by the Deputy Registrar and in pursuance thereof he issued a letter to Sri Dhiraj Singh on 09.1.2020 (annexure No. 17). In reply thereof Sri Dhiraj Singh had filed a detailed reply and also submitted that Sri Vishal Singh did not have the right to represent himself as the Secretary. It was also informed that the meeting dated 15.12.2019 where Sri Gyanendra Singh was appointed as the Secretary and it was attended by Sri Vishal Singh himself who was present and had participated and all these facts were well within his knowledge yet he concealed the same while making his representation before the Deputy Registrar that the post of Secretary lying vacant. It was also informed that the aforesaid facts were brought to the notice of the Deputy Registrar by means of letter dated 28.12.2019. In view thereof it was urged that the order dated 09.01.2020 be recalled.

98. Subsequently, the Deputy Registrar once again by means of his letter dated 01.02.2020 (annexure no. 23) required the petitioner to respond to the complaints of Vishal Singh and also indicated that till then no decision was taken by the Deputy Registrar on the complaints of Sri Vishal Singh. The petitioner thereafter had also informed the Deputy Registrar on 05.02.2020 that Sri Vishal Singh had been removed in the meeting of the Society held on 02.02.2020 (Annexure no. 27).

99. At this stage, it will be relevant to take note of the letter sent by the Deputy Registrar dated 01.02.2020 (annexure no. 23). From the perusal of the same, it would indicate that it is dated 01.02.2020, however, in the opening paragraph of the said letter, it takes note of the complaint sent by Sri Vishal Singh and also mentions certain dates of meetings held on 01.12.2019, 15.12.2019, 02.02.2020 and 14.03.2020. The relevant of the said letter is being quoted hereinafter:-

"1. अधोहस्ताक्षरी संस्था आर्य प्रतिनिधि सभा का कार्यवाहक मंत्री होने के कारण संस्था की नियमावली के प्राविधानों के अनुसार संस्था की अंतरंग सभा, साधारण सभा अथवा अन्य बैठकों के एजेण्डा/सूचना प्रेषित करने का उत्तरदायी है। संस्था के अनाधिकृत पदाधिकारी द्वारा संस्था की अंतरंग सभा की बैठक दिनांक–01.12.2019, 15.12.2019, 02.02.2020 एवं दिनांक–14.03.2020 एवं साधारण सभा का 136 वॉ वार्षिक अधिवेशन हेतु क्रमशः एजेण्डा संख्या–1748–1836 दिनांक–05.11.2019, एजेण्डा संख्या–1904 दिनांक–01.12.2019, एजेण्डा

संख्या–2256–2346 दिनांक–19.01.2020, एजेण्डा संख्या–2145–2235 दिनांक–15.01.2020 एवं एजेण्डा संख्या–2236 दिनांक–15.01.2020 प्रेषित कर बैठकें सम्पन्न की गयीं एवं आहूत की गयी।"

It is a appalling to note that the letter is dated 01.02.2020 and as seen from above opening para refers to certain meetings said to have been held on 02.02.2020 and 14.03.2020 which would be future events. How could such dates referring to some meetings of future date be incorporated by the Deputy Registrar. This letter raises quite a lot of issues on the functioning of the issuing authority, least said the better at this stage.

100. Moreover, when the Deputy Registrar had received the letter from Vishal Singh seeking appointment of an Observer for holding a meeting on 16.02.2020 and acting upon the same an Observer was appointed. In view thereof the report of the Observer assumed significance, inasmuch as, he was an officer appointed by the Deputy Registrar.

101. The record further indicates that the Observer had submitted his report (annexure no. 30) indicating that on 16.02.2020 on account of the ruckus created by the members present, the meeting could not be held and the police had to intervene. The police after securing the meeting hall, closed and shut the same and consequently the meeting could not be held. The report of the observer is dated 16.02.2020 and time of 11:51 AM is mentioned thereon (Annexure no. 31).

102. The record further indicates that the alleged Minutes of meeting which has been submitted by the rival faction of Vishal Singh is also dated 16.02.2020 indicating the venue to be the registered ofice of the Society at 5 Meera Bai Marg, Lucknow and the time is also indicated as 11:00 AM, which is apparently contradictory.

103. In the aforesaid backdrop, it was absolutely essential for the Deputy Registrar to have considered all the facts, material and its effect while passing the impugned order. Surprisingly, the order impugned does not even refer to the same nor the full and complete facts have been noticed.

104. Another aspect which ought to have been considered was when the Deputy Registrar had been made aware that there was a rift between Dr. Vishal Singh and Dhiraj Singh and various correspondence had exchanged and it was before the Deputy Registrar then without deciding or noticing the aforesaid facts and its implications in a complete arbitrary manner the Deputy Registrar has passed the impugned order accepting the list as submitted by Sri Vishal Singh and directed the same to be registered.

105. The Deputy Registrar has conveniently mentioned only the chronology of events as emanating a little prior to the passing of the order dated 30.07.2019 passed by this Court till the exchange of material and the passing of the order dated 02.11.2019, however, various correspondence and material brought on record in the interim period between 09.01.2020 to 16.02.2020 which were before the Deputy Registrar has been selectively and conveniently ignored.

106. This Court is also pained to note that on one hand the Deputy Registrar had been corresponding with the petitioner Dhiraj Singh and called upon him to

respond to the alleged complaints of Vishal Singh and despite the response having been filed yet the same remained undisposed and unconsidered, especially the effect of Annexure No. 23 in context with the material on record. Moreover, the Observer had also submitted his report regarding the alleged meeting not held on 16.02.2020 as per the Agenda in view of the ruckus and commotion created, yet in absolute haste upon an alleged Minutes submitted by Sri Vishal Singh and without even verifying the same, nor the Observer was consulted to verify his report nor Sri Dhiraj Singh was confronted with the same despite Sri Dhiraj Singh having informed the Deputy Registrar that the meeting could not take place on 16.02.2020 and that the meeting hall had been shut down and placed under the lock and key of the police concerned who only on the next date handed over the key of the office to Sri Dhiraj Singh.

107. That another aspect needed consideration was that apparently on 05.02.2020 a list of members was submitted by the petitioner Dheeraj singh before the Deputy Registrar. As the earlier complaints made by Vishal Singh and the response given by Dhiraj Singh was also before the Deputy Registrar, hence, without considering its effect as well as validity of the alleged meeting dated 16.02.2020 and accepting another list of members furnished by Sri Vishal Singh unilaterally raises eye-brows.

108. The provisions of Section 4 and 4 (B) of the Societies Registration Act, 1860 also has an important role to play. It will be apposite to notice a Division Bench decision of this Court in the case of ***T.P. Singh (Enrol No. 2473) Senior Advocate-Vs. Registrar/Assistant Registrar Firms Societies and Chits Aliarganj and 4 Others*** reported in ***2018 SCC Online Alld 1927*** wherein the Division Bench of this Court had the occasion to consider the provision of Section 4, 4-A and 4-B of the Societies Registration Act, 1860. Section 4-B of was inserted by the U.P. Act No. 13 of 1972 published in the Uttar Pradesh Gazette Extraordinary on 09.10.2013. The relevant Sections read as under:-

4. Annual list of managing body to be filed.--*(1) Once in every year, on or before the fourteenth day succeeding the day on which, according to the rules of the Society, the annual general meeting of the society is held, or, if the rules do not provide for an annual general meeting, in the month of January, a list shall be filed with the Registrar, of the names, addresses and occupations of the governors, council, directors, committee, or other governing body then entrusted with the management of the affairs of the society.*

Provided that if the managing body is elected after the last submission of the list, the counter signature of the old members, shall, as far as possible, be obtained on the list. If the old office-bearers do not counter-sign the list, the Registrar may, in his direction, issue a public notice or notice to such persons as he thinks fit inviting objections within a specified period and shall decide all objections received within the said period.

(2) *Together with list mentioned in sub-section (1) there shall be sent to the Registrar a copy of the memorandum of association including any alteration, extension or abridgment of purposes made under section 12, and of the rules of the society corrected up to date and certified by not less than three of the members of the said governing body to be correct copy and also a copy of the balance sheet for the proceeding year of account."*

*"**4-A. Changes etc. in rules to be intimated to Registrar**.*-- A copy of every change made in rules of the society and intimation of every change of address of the society, certified by not less than three of the members of the governing body shall be sent to the Registrar within thirty days of the change."

*"**4-B(1**)* At the time of registration/renewal of a society, list of members of General Body of that society shall be filed with the Registrar mentioning the name, father's name, address and occupation of the members. The Registrar shall examine the correctness of the list of members of the General Body of such society on the basis of the registrar of members of the General Body and minutes book thereof, cash book, receipt book of membership fee and bank pass book of the society.

(2) If there is any change in the list of members of the General Body of the society referred to in sub-section (1), on account of induction, removal, registration or death of any member, a modified list of members of General Body, shall be filed with the Registrar, within one month from the date of change.

(3) The list of members of the General Body to be filed with the Registrar under this section shall be signed by two office bearers and two executive members of the society."

108. Thereafter the Division Bench considering the scope of the aforesaid provisions in paragraph 25, 37, 38, 53 and 54 has held as under:-

25. *A plain reading of above provision shows that at the time of registration or renewal, a list of members of General Body of Society has to be filed by Assistant Registrar. Thereafter whenever there is any change in said list, same has to be informed to Registrar by submitting a modified list of members of General Body. When such a modified list is submitted to Registrar, in our view, examination allowed to be made by Registrar in respect of correctness of list of members of General Body in sub-section (1) would also include removal of member(s) for the reason, when modified list is communicated to Registrar, whether modification is on account of induction or removal in any manner, both aspects and correctness thereof can be and must be examined by Registrar.*

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*.....**37.** Court also observed that in making inquiry under Section 4-B of Act, 1860, Registrar is not a Post Office but supposed to act administratively by applying his mind on the facts and documents placed before him. Division Bench also referred to Supreme Court judgment in A.P. Aboobaker Musaliar v. District Registrar (G), Kozhikode, (2004) 11 SCC 247 and observed that when more than one returns are filed before Registrar, it may not hold an elaborate enquiry but bound to satisfy himself prima facie as to which return is to be accepted. Inquiry made by Registrar is not final and aggrieved party can always take up the matter before a Competent Court. Court also held that term "membership" has been defined under Act, 1860 and it indicates that a member of a Society shall be a person who, having been admitted therein according to rules and regulations, paid subscription, signed the roll or list of members and has not resigned in accordance with such rules and regulations. Hence, upholding action taken by Deputy Registrar, Court in para 55 of judgment observed:*

"The original records were deposited by the appellant. The Deputy Registrar has

undertaken exercise to verify the membership on the basis of agenda, proceedings, membership register and passbook of the bank account etc., and found that there was nothing illegal in the induction of those members and proceeded to accept the membership under Section 4-B of the Act on 17.10.2014." .....(emphasis added)

38. *This judgment makes it clear that under Section 4-B of Act, 1860, Registrar is not supposed to make adjudication of dispute of correctness of membership like a Court but whenever a list is submitted or there is any change in the list of members and any objection is raised or otherwise, Registrar has to prima facie satisfy himself that change has been made in accordance with provisions of bye-laws and prima facie genuine. For this purpose, Registrar may examine agenda, minutes of meeting and other relevant steps taken by Society. To this extent, an inquiry can be made by Registrar to find out whether list of members or change in list of members is correct or not.*

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53. *The discussion made by us and facts stated above show that Society in question, in the present case, held a meeting with agenda to consider letters of petitioner and thereupon read those letters as constituting a misconduct, justifying termination of membership and resolved to terminate membership of petitioner. This resulted in change in in the list of members of Society and hence was communicated to Assistant Registrar. Petitioner filed objection raising various issues including issue of membership of some other persons as well as some office bearers of Society. It may be noticed that a person, filing objection before Assistant Registrar, may raise a whole gamut of issues to Assistant Registrar which may be a combination of issues, some within jurisdiction of Assistant Registrar and some beyond but then the Registrar/Assistant Registrar can always discern substantive issues which are within the scope of scrutiny and within his jurisdiction and can respond to those aspects. It is the substance and not the tenor of language or draft of letter by Objector, which has to be seen by Assistant Registrar/Registrar who is a statutory authority supposed to look into the matter in exercise of statutory power conferred under Section 4-B of Act, 1860. It is true that Registrar/Assistant Registrar may not go into a detailed adjudication of a disputed question of fact like a Civil Court and remedy obviously would be available to the party concerned to take recourse to Civil Court but the mandate contained in the Statute regarding scrutiny, to the extent it is provided, has to be observed and discharged. Registrar/Assistant Registrar is obliged to examine the question of correctness of alteration or change or modification in the list of members when an objection is taken. Cancellation/termination/removal of membership is a mode of alteration of list of General Body of Society. Section 4-B of Act, 1860 talks of correctness of list of members, which can be examined by Registrar/Assistant Registrar. Documents, which are supposed to be furnished to Registrar/Assistant Registrar are also specifically mentioned therein and from those documents whatever facts discern, may be seen to find out whether Society, in a bona fide manner has followed its own procedure laid down in Bye laws. For example, if abruptly a resolution is passed without there being any agenda on a particular issue and bye-laws require circulation of agenda to the members before meeting containing subject, it is apparent that action taken by Society is not*

in accordance with bye-laws and thus its decision would not be correct and can be interfered by Registrar/Assistant Registrar. Similarly, from documents relating to fee, if it is found that requisite fee has not been paid by a person inducted as member though deposit of fee is one of the conditions to become a member of Society, Registrar/Assistant Registrar can interfere and declare induction of such member to be illegal and declare resolution to this effect, bad in law. Similarly, if Society claims that fee has been deposited but from bank passbook, this claim is not found correct, Registrar/Assistant Registrar can again interfere. These are a few illustrations only. This interference includes declaration of resolution bad or illegal, and, mere fact that request has been made that resolution should be cancelled or be declared illegal, by itself, would not deprive Registrar/Assistant Registrar from entering into scrutiny to the extent it is mandated by Section 4-B of Act, 1860 otherwise the very objective and purpose of insertion of Section 4-B of Act, 1860 would stand defeated.

***54**. The legislature intended to curtail litigation on account of frivolous induction or removal of members and alteration in the list of members of Society, being aware of the fact that remedy available in common law is time consuming and if disputes remain pending for long time, interest of Society in many cases suffer seriously. To give effect to the intention of legislature completely, Registrar/Assistant Registrar is obliged to examine correctness of any inclusion, alteration, change etc. in the membership of Society particularly when an objection is raised. It must examine relevant record and find out the facts evident from record as to whether decision has been taken in accordance with procedure prescribed in bye-laws, bona fide and genuine.*

109. Thus, this aspect of the matter was also before the Deputy Registrar which has not been considered and has been given a complete go-by.

110. The Deputy Registrar who is an Authority having powers conferred under the Societies Registration Act, 1860 is definitely an Authority covered under the Article 12 of the Constitution of India. Thus, all its decisions are required to comply with the doctrine of equality and fairplay including granting of an opportunity of hearing.

Once the entire matter was available before the Deputy Registrar and already response had been called from Dr. Dhiraj Singh then the least that was expected was to provide a hearing to Dr. Dhiraj Singh before passing the impugned order.

111. The Apex Court in the case of ***Canara Bank Vs. Debashish Das and others*** reported in ***2003 (4) SCC 557*** in paragraph 9 has held as under:-

*"**9**. A bare reading of sub-regulation (18) of Regulation 6 makes the position clear that there is no requirement of the employee being granted an opportunity to file written briefs after the Presenting Officer files written briefs. On the contrary, as the provisions postulate, after completion of production of evidence, two options are open to the inquiry officer. It may hear the Presenting Officer appointed and the employee concerned or in the alternative, permit them to file written briefs within 15 days of the date of completion of the production of evidence if they so desire. The written briefs are*

relatable to the cases of the party concerned; otherwise the expression "respective case" would be meaningless. In other words, the written briefs must contain what his case is. There is no requirement of filing written briefs one after the other. It is not required that one party has to wait till filing of written briefs by the other. The expression "respectively" means belonging or relating separately to each of several people. It is a word of severance."

112. Similarly, the Apex Court in the case of ***Prakash Ratan Sinha Vs. State of Bihar and Others*** reported in ***2009 (14)SCC 690*** in paragraph **13** and **14** has held as under:-

*"**13**. The law in this regard has been settled by several decisions of this Court. The principle that emerge from the decisions of this Court is that, if there is a power to decide and decide detrimentally to the prejudice of a person, duty to act judicially is implicit in exercise of such a power and that the rule of natural justice operates in areas not covered by any law validly made.*

***14.** Corollary principles emanating from these cases are as to what particular rule of natural justice should apply to a given case must depend to an extent on the facts and circumstances of that case and that it is only where there is nothing in the statute to actually prohibit the giving of an opportunity of being heard and on the other hand, the nature of the statutory duty imposed on the decision maker itself implies an obligation to hear before deciding. These cases have also observed, whenever an action of public body results in civil consequences for the person against whom the action is directed, the duty to act fairly can be presumed and in such a case, the administrative authority must give a proper opportunity of hearing to the affected person."*

113. Yet again the Apex Court in the case of ***Nisha Devi Vs. State of Himachal Pradesh and Others*** reported in ***2014 (16) SCC 392*** in paragraph 5 has held as under:-

*"**5**. Trite though it is, we may yet again reiterate that the principle of audi alteram partem admits of no exception, and demands to be adhered to in all circumstances. In other words, before arriving at any decision which has serious implications and consequences to any person, such person must be heard in his defence. We find that the High Court did not notice the violation and infraction of this salutary principle of law. Accordingly, on this short ground, the impugned judgments and orders require to be set aside, and are so done. The matter is remanded back to the Divisional Commissioner for taking a fresh decision after giving due notice to the appellant and affording her an opportunity of being heard. The Divisional Magistrate, Kullu, shall complete the proceedings expeditiously, and not later than six months from the date on which a copy of this order is served on him."*

114. This Court hastens to add that the order impugned does not reflect any application of judicial mind nor it incorporates any reasons in the order. It is now well settled that any order which is bereft of reasons canot be sustained as it violates the basis principles of equity and fairplay. Thus, for all the reasons, this Court is of the considered opinion that the Deputy Registrar has abdicated its duties. The order dated 19.03.2020 has been passed in haste without considering the material before it including the rival claims,

the explanation and replies furnished by Dr. Dhiraj Singh. Last but not the least the impugned order is bereft of any reasons and has been passed without affording any opportunity of hearing to Dr. Dhiraj Singh, consequently, this Court finds that the impugned order is bad and suffers violations of principles of natural justice.

115. It will be apposite to note the pronouncement of the Apex Court in the case of ***M/s Neeharika Infrastructure Pvt. Ltd. Vs. State of Maharashtra*** reported in ***AIR 2021 SC 1918*** in parargraph 21.3 and 21.4 The Apex Court has noticed the earlier decision of Hindustan Times Ltd. Vs. Union of India reported in 1998 (2) SCC 242 and also relied upon the observations made in para 47 of the reported case of Kranti Associates (P).Ltd. Vs. Masood Ahmad 2010 (9) SCC 496. The relevant paragraph no. 21.3 and 21.4 are being reproduced hereinafter:-

21.3 *In the case of Hindustan Times Limited v. Union of India, (1998) 2 SCC 242, while emphasising on giving reasons by the High Court, it is observed that necessity to provide reasons, howsoever brief, in support of the High Court's conclusions is too obvious to be reiterated. Obligation to give reasons introduces clarity and excludes or at any rate minimises the changes of arbitrariness and the higher forum can test the correctness of those reasons.*

21.4 *While considering the importance of the reasons to be given during the decision-making process, in the case of Kranti Associates (P) Ltd. v. Masood Ahmed, (2010) 9 SCC 496, in paragraph 47, this Court has summarised as under:*

"47. Summarising the above discussion, this Court holds:

(a) In India the judicial trend has always been to record reasons, even in administrative decisions, if such decisions affect anyone prejudicially.

(b) A quasi-judicial authority must record reasons in support of its conclusions.

(c) Insistence on recording of reasons is meant to serve the wider principle of justice that justice must not only be done it must also appear to be done as well.

(d) Recording of reasons also operates as a valid restraint on any possible arbitrary exercise of judicial and quasi-judicial or even administrative power.

(e) Reasons reassure that discretion has been exercised by the decision-maker on relevant grounds and by disregarding extraneous considerations.

(f) Reasons have virtually become as indispensable a component of a decision-making process as observing principles of natural justice by judicial, quasi-judicial and even by administrative bodies.

(g) Reasons facilitate the process of judicial review by superior courts.

(h) The ongoing judicial trend in all countries committed to rule of law and constitutional governance is in favour of reasoned decisions based on relevant facts. This is virtually the lifeblood of judicial decision-making justifying the principle that reason is the soul of justice.

(i) Judicial or even quasi-judicial opinions these days can be as different as the judges and authorities who deliver them. All these decisions serve one common purpose which is to demonstrate by reason that the relevant factors have been objectively considered. This is important for sustaining the litigants' faith in the justice delivery system.

(j) Insistence on reason is a requirement for both judicial accountability and transparency.

(k) If a judge or a quasi-judicial authority is not candid enough about his/her decision-making process then it is impossible to know whether the person deciding is faithful to the doctrine of precedent or to principles of incrementalism.

(l) Reasons in support of decisions must be cogent, clear and succinct. A pretence of reasons or "rubber-stamp reasons" is not to be equated with a valid decision-making process.

(m) It cannot be doubted that transparency is the sine qua non of restraint on abuse of judicial powers. Transparency in decision-making not only makes the judges and decision-makers less prone to errors but also makes them subject to broader scrutiny. (See David Shapiro in Defence of Judicial Candor [(1987) 100 Harvard Law Review 731-37] .)

(n) Since the requirement to record reasons emanates from the broad doctrine of fairness in decision-making, the said requirement is now virtually a component of human rights and was considered part of Strasbourg Jurisprudence. See Ruiz Torija v. Spain [(1994) 19 EHRR 553] EHRR, at 562 para 29 and Anya v. University of Oxford [2001 EWCA Civ 405 (CA)] , wherein the Court referred to Article 6 of the European Convention of Human Rights which requires, "adequate and intelligent reasons must be given for judicial decisions".

(o) In all common law jurisdictions judgments play a vital role in setting up precedents for the future. Therefore, for development of law, requirement of giving reasons for the decision is of the essence and is virtually a part of "due process"." Therefore, even while passing such an interim order, in exceptional cases with caution and circumspection, the High Court has to give brief reasons why it is necessary to pass such an interim order, more particularly when the High Court is exercising the extraordinary and inherent powers under Section 482 Cr.P.C. and/or under Article 226 of the Constitution of India. Therefore, in the facts and circumstances of the case, the High Court has committed a grave error of law and also of facts in passing such an interim order of "no coercive steps to be adopted" and the same deserves to be quashed and set aside. Criminal Miscellaneous Petition No. 4961 of 2021."

116. Another argument was raised by the counsel for the Society respondent no. 7 that fresh elections have taken place. This fact was denied by the learned counsel for the petitioner, however, unfortunately, neither the Counsel for the Society Dr. Mishra or Sri Dwivedi could bring any material on record to indicate that any elections have been held or that the process has commenced, even though the counter affidavit was filed on 18.03.2021 after the hearing had commenced in the aforesaid petition.

Be that as it may, no worthy material has been filed to substantiate the aforesaid plea. Neither the State Counsel could confirm or deny the aforesaid fact and as already noticed above the State Counsel during the entire hearing has stood as a mute spectator despite the orders dated 06.07.2019 passed by the Court requiring the State respondents assist the court and to file its counter affidavit indicating whether any opportunity of hearing was provided to Dhiraj Singh before passing the impugned order. Hence, in absence of any cogent material on record, this Court refrains from

taking notice of any such argument which has no basis or pleadings nor any material to substantiate it.

117. In light of the detailed discussions as noted above, this Court is of the definite view that the impugned order has been passed without granting opportunity of hearing to the petitioner also it does not refer to the entire facts and material before the Authority concerned nor the effect and implications of the material before it was considered apart from the fact that the impugned order is bereft of reasons and is liable to be set aside.

This Court has deliberately refrained from expressing any opinion on merits of the allegations and counter allegations of the parties, lest it may prejudice the case of either of the parties.

Accordingly, this Court is of the considered view that the petitioner Dr Dhiraj Singh succeeds and the writ petition No. 9735 (MS) of 2020 is allowed. A writ in the nature of certiorari is issued and the impugned order dated 19.03.2020 passed by the Deputy Registrar contained in Annexure No. 1 to the writ petition is quashed and set aside. Consequences to follow.

Further, the matter is remitted to the Deputy Registrar with a direction that he shall after affording full opportunity of hearing to the parties concerned shall re-consider the entire matter in light of the observations made above (which may not be taken as an expression on merits) and on the basis of the material on record submitted and submissions made by the parties and decide the matter afresh on merits by passing a reasoned and a speaking order, strictly in accordance with law, as expeditiously as possible preferably within 4 months from the date an authenticated copy of this judgment is placed before the Authority concerned.

W.P. No. 4115 (MS) of 2020

118. As already noticed above, the order dated 02.11.2019 is under challenge and by means of the said order, the Deputy Registrar has rejected the representation of Devendra Pal Verma and found that the petitioner Devendra Pal Verma could not establish that he was a member of the Arya Pratinidhi Sabha.

119. Just to recall, it will be apposite to notice that a coordinate Bench of this Court by means of order dated 30.07.2019 while deciding a bunch of three writ petitions directed the Deputy Registrar to determine the issue regarding the membership of Devendra Pal Verma.

120. Sri Gaurav Mehrotra, learned counsel appearing for Sri Dhiraj Singh (respondent no. 3 in the instant petition) has raised a preliminary objection. First objection is on the premise that since Devendra Pal Verma is not a member of the Society i.e. the Arya Pratinidhi Sabha, hence, he is precluded from filing the above writ petition indicating himself as the President. Since the Society has not issued any authorization in favour of Sri Devendra Pal Verma, hence, neither he can mantain the petition as an individual member nor does he had the right to maintain the petition as Presindent of the Society i.e. petitioner no. 1.

121. Needless to state that the above issue has been considered by this Court in this judgment while dealing with the similar preliminary objection raised by Dr. Mishra in respect of the petition filed by Dhiraj Singh. In light of the decision of this

Court in the case of ***Jagdimbaka Prasad Pandey (supra),*** this Court finds that as the individual rights of Devendra Pal Verma has been called in question, thus, he as petitioner no. 2 in his personal capacity does have a right to maintain the petition though it may be correct to state that in so far as the impleadment of the Society as petitioner no. 1 and indicating Devendra Pal Verma as its president is concerned, the same is not quite appropriate as there is neither any authorization by the Society in favour of Sri Devendra Pal Verma to institute the writ petition and the learned counsel for the petitioner Devendra Pal Verma could not dispute the same, hence, to that extent the objection of Sri Mehrotra does have substance. Accordingly, the petition though may not be maintainable at the behest of the Society being represented by Sri Devendra Pal Verma but nevertheless this Court is considering the petition squarely on the premise and treating Devendra Pal Verma as sole petitioner who in his personal capacity and as an aggrieved person, in light of the decision of ***Jagdimbaka Prasad Pandey (supra)*** is agitating his rights and hold that the petition is maintainable at the behest of petitioner no. 2 Devendra Pal Verma alone. Thus, the points for determination at serial nos. 1 and 2 in W.P. No. 4515 (MS) of 2020, accordingly, stands answered.

122. The other issue relates to whether the order dated 02.11.2019 can be interfered with under the powers of judicial review. It would be seen and shall also be evident from the record that the question before the Deputy Registrar was regarding the membership of Devendra Pal Verma. Sri Devendra Pal Verma was granted opportunity to represent his case and in furtherance thereof Sri Devendra Pal Verma submitted his complaint dated 27.03.2017, representation dated 09.08.2019 and his rejoinder affidavit dated 19.09.2019 and 30.09.2019.

123. The record further indicates that the Deputy Registrar has considered the aforesaid pleadings/complaints/replies and rejoinder affidavit filed by the petitioner in detail. The record further reveals that it has been found that Sri Devendra Pal Verma was removed from the primary membership of Arya Sabha, Muzaffarnagar in the meeting held on 24.07.2019. Reliance has also been placed on an order passed by the Civil Judge, Junior Division, Muzaffarnagar in R.S. No. 5021 of 2019 dated 18.09.2019 which indicates that Devendra Pal Verma is not a member of Arya Samaj, Muzaffarnagar. It has also been considered that in light of the byelaws of the Society unless and until a person is a subsisting valid and bonafide member of a Arya Samaj in that district, he cannot be a member of Arya Pratinidhi Sabha.

124. The bye-laws envisages that only a valid and bonafide member of any Arya Samaj can become a member of the Arya Pratinidhi Sabha and amogst such members of the Arya Pratinidhi Sabha it elects its own governing body. Accordingly, once the primary membership of Devendra Pal Verma at the district level had been cancelled and he was so removed, accordingly, he lost his right to be a member of the governing body. This aspect has been considered by the Deputy Registrar basing its decision on the documents furnished as well as in light of the bye-laws and and he has recorded a categorical finding that Devendra Pal Verma despite having been filed various pleadings yet could not establish that he is a bonafide member of the District Arya Samaj, hence, he cannot be treated as a

member of the Arya Pratinidhi Sabha nor could he hold the office of the President as alleged, hence, his complaint dated 27.03.2017 and representation dated 09.08.2019 were rejected as being not maintainable.

125. The learned counsel for the petitioner though argued at length but could not indicate any error in the order impugned in light of the material before the Deputy Registrar.

126. Dr. Mishra as a last ditch attempt submitted that the order cancelling the membership of the petitioner Devendra Pal has been recalled by the District Arya Samaj, Muzaffarnagar on 19.07.2020. Attention of the Court has been drawn to paragraph 10 to 14 of the rejoinder affidavit filed on 18.03.2020 and it has been submitted that the meeting of the Arya Samaj, District Muzaffarnagar was held on 17.07.2020 wherein it was found that the termination of the membership of Devendra Pal Verma along with Sri Kastoor Singh Sanehi and Vijay Gupta was void, consequently, the said resolution was recalled and the membership of Sri Devendra Pal Verma has been restored. The relevant documents have been brought on record as Annexure No. RA-1, RA-2 and RA-3 with the rejoinder affidavit. It has been submitted that the membership of the petitioner-Devendra Pal Verma has been restored and in view thereof the impugned order deserves to be set aside.

127. Sri Gaurav Mehrotra, learned counsel for the respondent no. 3 Sri Dhiraj Singh in the instant petition has controverted the aforesaid issue on the ground that the record would indicate that the District Arya Samaj, Muzaffarnagar is in control of the Administrator so appointed. He has submitted that an Administrator does not have the right to either enroll any member or remove any member. On the strength of the aforesaid, it is urged that the Administrator does not possess the authority to recall the resolution dated 24.07.2019 which was passed by the Arya Samaj, Muzaffrngar for expulsion of the petitioner from his primary membership.

128. It has been submitted that the issue regarding enrolling a new member or expelling a member is conferred on legally constituted Committee and an Administrator is not empowered to take any policy decision. For the said reason, it is submitted that the membership of Sri Devendra Pal Verma cannot be treated to have been restored.

129. Be that as it may, since it has been informed and brought on record that the removal of Sri Devendra Pal Verma has been recalled by the Arya Samaj, District Muzaffarnagar vide resolution passed in a meeting dated 19.07.2020 and that the Arya Pratinidhi Sabha has also approved the same on 26.09.2020 and the relevant documents have been brought on record as Annexures Nos. RA-1, RA-2 and RA-3. Though, this has been opposed by the learned counsel for Sri Dhiraj Singh but nevertheless this Court is not required to adjudicate upon the issue regarding the validity of the minutes of the meeting dated 19.07.2020 or the approval granted by the Arya Pratinidhi Sabha on 26.09.2020 as that has not been assailed nor is the subject matter of the aforesaid writ petition.

130. If the membership of Devendra Pal Verma has been restored then the same will have its own consequences and any person aggrieved by the aforesaid may

raise his objections before the appropriate forum, however, since the matter is not before this Court, hence, this Court refrains from making any observations in respect thereto.

131. Having considered the rival submssions and from perusal of the record, this Court is of the considered opinion that as far as the merit of the order dated 02.11.2019 is concerned, the same does not suffer from any error apparent on the face of the record nor the finding recorded by the Deputy Registrar in the said impugned order can be termed to be perverse or the conclusion arrived at is such that any prudent person could not arrive at such a conclusion, hence, this Court is not persuaded to intervene in the matter. Accordingly, this Court is not inclined to interfere with the impugned order.

132. In view of the aforesaid, this Court does not find any merit in the instant petition and the same is dismissed. In the facts and circumstances, there shall be no order as to costs.

Conclusions:-

133. For the detailed reasons incorporated hereinabove;

(i) Writ Petition No. 9735 (MS) of 2020 (Dr.Dheeraj Singh Vs. State of U.P. Through Addl. Chief Secretary/Principal Secretary Finance & Others) shall stand allowed.

(ii) Writ Petition No. 4515 (MS) of 2020 (Arya Pratinidhi Sabha U.P. Through Pradhan Devendra Pal Verma and Another Vs. State of U.P. Through Addl. Chief Secretary, Institutional Finance and Others) shall stand dismissed, however, in both cases there shall be no order as to costs.

134. 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.

135. 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)06ILR A199
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 24.05.2021

BEFORE

THE HON'BLE RAVI NATH TILHARI, J.

Misc. Single No. 10970 of 2021

Usha ...Petitioner
Versus
State Election Commissioner Panchayat U.P. LKo. & Ors. ...Respondents

Counsel for the Petitioner:
Vijay Shankar Trivedi, Nitya Nand Mani Tripathi

Counsel for the Respondents:
Rakesh Kumar Chaudhary

(a) Election - U.P. Panchayat Raj Act, 1947 - Section 12-H - If a person was elected against casual vacancy caused due to voidance of the election of earlier Pradhan, the term would be for the residue of the term of Gram Panchayat. (Para 18)

Writ Petition Rejected. (E-8)

List of Cases cited:-

1. Savitri Devi Vs. St. of U.P. & ors. 2017 (124) ALR 863: 2017 (136) RD 328 (Alld) *(followed)*

(Delivered by Hon'ble Ravi Nath Tilhari, J.)

1. As per the office report, one of the defects pointed out at serial No.1 is that the power has not been signed by one of the counsels for the petitioner. The power has not been signed by Shri Nitya Nand Mani Tripathi, Advocate. The power has been signed only by Shri Vijay Shankar Trivedi, Advocate.

2. Shri Nitya Nand Mani Tripathi, Advocate appears through video conferencing and submits that due to inadvertence, the Vakalatnama could not be signed by him. He submits that he would argue the matter as holding brief of Shri Vijay Shankar Trivedi. He is permitted to argue the matter.

3. By means of this writ petition, the petitioner has prayed for the following main relief:-

"Issue a writ order or direction in the nature of Mandamus commanding the opposite parties not to give the Oath/ charge for the post of Gram Pradhan of Village Panchayat Naseerpur Chhitauna, Block jahangirganj, Tehsil Aalapur, District-Ambedkar Nagar to the opposite party No.5 and not to allow her to function on the aforesaid post of Gram Pradhan."

4. Learned counsel for the petitioner submits that in the elections held for the post of Gram Pradhan in the year 2015 Smt. Seema Pandey was declared elected on 13.12.2015. Her election was challenged by the petitioner in an election petition Case No.2002/2016 under Section 12-C of the U.P. Panchayat Raj Act, 1947 which was allowed by the Sub-Divisional Officer, Ambedkar Nagar vide order dated 12.11.2018 whereby the election of the post of Pradhan, dated 13.12.2015, was declared null and void. Subsequently, election for the post of Pradhan was held again in the year 2019, in which the petitioner was declared as the elected Pradhan. His submission is that as the petitioner took charge on 7.8.2019, her period of five years, would come to an end on 6.8.2024 and consequently no election, for the post of Pradhan of the concerned Village Panchayat could be legally held in the year 2021, i.e., the present elections.

5. Learned counsel for the petitioner submits that the petitioner has filed Writ Petition No.10103 of 2021 (M/S) to quash the election scheduled for 29.04.2021 and to allow the petitioner to continue on the post for Gram Pradhan upto 06.08.2024, which is pending before this Court and as in the meantime election were held in which Opposite Party No.5 was declared elected, the present petition has been filed for the relief that the opposite party No.5 be not administered oath and be not allowed to function as Pradhan.

6. Sri Raj Bux Singh, learned Additional Chief Standing Counsel has raised a preliminary objection that in view of the pendency of Writ Petition No.10103 of 2021 (M/S), in which the same question has been agitated by the petitioner, the present writ petition is not maintainable as in effect and substance this would be the second writ petition.

7. In rebuttal, learned counsel for the petitioner submits that the declaration of result in favour of opposite party No.5 has given fresh cause of action to maintain this writ petition.

8. Ms. Shreya Chaudhary, Advocate holding brief of Shri Rakesh Kumar Chaudhary, learned counsel for the opposite party Nos.1 & 2, has submitted that after the election of the year 2015 was set side in the election petition, the by-election was held in the year 2019 in which the petitioner was elected, not for a period of five years but for the remaining period of the Gram Panchayat.

9. I have considered the submissions advanced by the learned counsels for the parties and perused the material on record.

10. The preliminary objection to the maintainability of the present writ petition as raised by the learned State Counsel is devoid of any merit in as much as Writ Petition No.10103 of 2021 (M/S) was filed against the election process and voting which was scheduled for 29.4.2021 and by that time as election was not held the relief as prayed in the present writ petition could not be asked for in the earlier writ petition. Declaration of result of election is a fresh cause of action. The ground of challenge as in the present writ petition might also be the ground of challenge in the earlier writ petition but on the basis thereof it cannot be held that the present is the second writ petition on the same subject matter. The earlier writ petition is pending in which the legality or sustainability of the ground of challenge has yet not been tested.

11. I therefore proceed to decide the present writ petition considering the ground of challenge as raised herein, overruling the preliminary objection.

12. The election of Pradhan for the concerned village Panchayat was earlier held in the year 2015, but was declared void by order dated 12.11.2018 passed by the Prescribed Authority in the election petition. Thereafter, the election was held in the year 2019 in which the petitioner was elected as Pradhan and administered oath on 7.8.2019.

13. The short question is as to what is the term of the petitioner as Pradhan when elected in the elections held in 2019, consequent upon setting aside of the elections held in 2015.

14. The election of Pradhan held in 2019 in which the petitioner was declared elected, was a by-election, to fill the vacancy caused due to declaration of the election of the earlier Pradhan as void, in the election petition. The vacancy for which election was held in 2019 was a casual vacancy. The certificate issued by the State Election Commission annexed as Annexure No.2 to the petition, clearly demonstrates that the petitioner was elected in by-elections.

15. Section 12-H of the U.P. Panchayat Raj Act, 1947 (in short referred to as " Act, 1947), provides as under:-

"If a vacancy in the office of the Pradhan, or a member of a Gram Panchayat arises by reason of his death, removal, resignation, voidance of his election or refusal to take oath of office, it shall be filled before the expiration of a period of six months from the date of such vacancy, for the remainder of his term in the manner, as far as may be, provided in Sections 11-B, 11-C, or 12, as the case may be:

Provided that if on the date of occurrence of such vacancy the residue of the term of the Gram Panchayat is less than six months, the vacancy shall not be filled."

16. Section 12-H of the Act, 1947, clearly provides that if a vacancy in the office of the Pradhan arises by reason of his death, removal, resignation, voidance of his election or refusal to take oath of office, it shall be filed before the expiration of six months from the date of such vacancy, for the remainder of the term of the Gram Panchayat, provided that, if on the date of occurrence of such vacancy the residue of the term of Gram Panchayat is less that six months, the vacancy shall not be filled. In view of this provision, if vacancy is caused due to voidance of election of a Pradhan the same shall be filled for the residue of the term of the Gram Panchayat, if it is not less than six months on the date of occurrence of vacancy.

17. In ***Savitri Devi Vs. State of U.P. and others 2017 (124) ALR 863: 2017 (136) RD 328 (Alld),*** this Court has held as under:

" 4. It is noteworthy that the existing vacancy is a casual vacancy which falls under section 12-H of U.P. Panchayat Raj Act, 1947 and has to be filled by regular election as provided under section 11-B of the Act. Section 12-H puts a mandate that such vacancies shall be filled before expiration of the period of six months from the date of occurrence of vacancy. ***Further the elected candidate would be entitled to continue for the remainder of the term in office of the Pradhan****. The proviso to section 12-H, however, says that in case, the residue of the term is less than six months such vacancy shall not be filled by election. Section 12-J, however, provides for making temporary arrangement by nomination of a member of Gram Panchayat to discharge the duties and exercise the powers of Pradhan until vacancy is filled up."*

18. The question framed in Paragraph 13, is answered, that, as the petitioner was elected against casual vacancy caused due to voidance of the election of earlier Pradhan, the petitioner's term would not be five years, but would be for the residue of the term of Gram Panchayat.

19. In view of the aforesaid, the submission made by learned counsel for the petitioner that the petitioner's term would come to an end in the year 2024 has no substance and is rejected. The term of the petitioner as Pradhan came to an end with the expiry of the term of the Gram Panchayat.

20. The writ petition is devoid of merit and is hereby **dismissed.**

(2021)06ILR A202
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 16.06.2021

BEFORE

THE HON'BLE ATTAU RAHMAN MASOODI, J.
THE HON'BLE AJAI KUMAR SRIVASTAVA-I, J.

Misc. Bench No. 10971 of 2021

Kamal Daniel & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Raghvendra Pandey, Viksit Arora

Counsel for the Respondents:
G.A.

(a) Criminal Law - Simultaneous First Information Report – code of Criminal Procedure, 1973 - Section 154 - Due to technical lapses two FIRs had been registered by the police station. The Court observed that since the technical problem has come to be pointed out at a nascent stage of investigation

therefore the rule of double jeopardy is not attracted. The petitioner have not attributed any mala fides in this regard. Moreover, the competent court has also passed an order continuing the two proceedings as one for multiple offences. (Para 25)

The discovery of any material, oral or documentary, after the registration of the earliest FIR under 154 Cr.P.C. forms a part of the investigation by virtue of Section 162 Cr.P.C. for filling the police report or supplementary report under Section 173(2) Cr.P.C. Thus, rectification at the nascent stage of investigation being exceptional in the present case is accepted. (Para 27)

Writ Petition Rejected. (E-8)

List of Cases cited:-

1. T.T. Antony Vs St. of Kerala & ors. (2001) 6 SCC 181 *(distinguished)*

2. St.of Pun. Vs Davinder Pal Singh B156hullar (2011) 14 SCC 770 *(distinguished)*

3. Emperor Vs Khwaja Nazir Ahmad AIR (32) 1945 PC 18

4. St. of Hary. Vs Bhajan Lal 1992 Supp.(1) SCC 335

(Delivered by Hon'ble Attau Rahman Masoodi, J.)

1. Heard Shri Siddharth Luthra, learned Senior Advocate assisted by Shri Raghvendra Pandey, Viksit Arora and Shri Nadeem Murtaza on behalf of the petitioners and Sri V.K. Shahi, learned AAG assisted by Shri S.P. Singh, learned Additional Government Advocate for the State.

2. This writ petition has fallen in the lap of this Court under peculiar circumstances. There is a folklore that a wrongful mind breeds evil and a rightful conduct fountains nothing but truth. Humanity is universally subjugated to the influence of evil and it is difficult to carve out an exception in the modern world of any popular civilized order that guarantees personal liberty ideally and enforces the human rights by adhering to the exemplary standards. The rule of law nevertheless must prevail to strengthen social and economic peace.

3. The criminal administration of justice under the Constitution of India hinges on Article 21 read with Article 20 and this is what the framers of our Constitution have fundamentally guaranteed to the citizens. The procedure prescribed under law is as fundamental under Article 21 as the right of personal liberty itself whereas Article 20(2) of the Constitution of India protects a citizen from the prosecution and punishment for the same offence more than once.

4. The present writ petition has challenged the legality of an FIR registered vide number 98 of 2021 the investigation whereof was transferred to SIT by opposite party no.1 on the date of registration of FIR itself i.e. 4.3.2001. The SIT renumbered the case vide FIR number 4 of 2021 under Section 420, 467, 468, 471, 477-A IPC. The original number of the second FIR i.e. 98 of 2021 is mentioned in the corresponding record of the FIR of SIT i.e. FIR No. 4/2021 with all relevant particulars including the date of registration of the second FIR on 4.3.2021 at 3.52 hours. The presentation of the written information of recovery memo in the police station is mentioned at 3.51 hours whereas the date of occurrence is shown at 1.45 hours to 1.45 hours on 4.3.2021.

5. The FIR was registered against as many as sixteen persons but the owner of

the manufacturing company for whose benefit the double exit of country made liquor on a single waybill (bilty)/gate pass was indulged into, despite being the main profiteer of the alleged occurrence mentioned in the recovery memo, was not named in the FIR and has not been arrested even otherwise.

6. The petitioners have challenged the FIR mainly on the ground that the same written information in respect of the alleged occurrence was already registered at 3.51 hours as FIR No. 97 of 2021 under Section 60 of the Excise Act, 1910 at the same police station on the same day, therefore, the registration and fresh investigation pursuant to the second FIR arising out of the same occurrence/information within a closest proximity of time for multiple offences under IPC was impermissible in the eye of law and hence the impugned FIR may be quashed alongwith the investigation held in pursuance thereof and the petitioners no. 2, 8 to 15 sent to judicial custody may be released on interim bail.

7. The facts of the case according to the petitioners, briefly stated, are that FIR No. 97 of 2021 under Section 60 of Excise Act, 1910, renumbered by SIT as FIR No. 3 of 2021 was already registered at the concerned police station containing entirely the same version as that of second FIR No. 98 of 2021 registered under Section 420, 467, 468, 471, 477-A IPC on 4.3.2021. The police authorities having registered the two FIRs within a margin of one minute proceeded to arrest the petitioners no. 8, 9, 10, 11, 13, 14 and 15 on the same day and on production before the competent court, they were taken into judicial custody under remand orders passed separately on 4.3.2021 in both the cases i.e. Case Crime No. 97 of 2021 under Section 60 of the U.P. Excise Act, 1910 and Case Crime No. 98 of 2021 under Section 420, 467, 468, 471, 477-A IPC and Section 66 IT Act. The petitioners no. 2 and 12 were likewise arrested thereafter and remanded to judicial custody and are presently in jail. The investigating officer having held some investigation does not appear to have apprised the competent court of any technical difficulty about the two FIRs, as such, interlocutory remand orders were separately passed on 4.3.2021 and extended thereafter in both the cases. The record reveals that police report was filed on 1.5.2021 in case crime no. 3/2021 under Section 60(2) of the U.P. Excise Act, 1910 whereafter the remand was extended in the other case. The first case was posted for taking cognizance after reopening of the courts closed due to lockdown.

8. In the meantime, the petitioners no. 1, 3 and 4 were granted anticipatory bail, whereas petitioner no. 5 was granted interim stay of arrest in the first FIR. The petitioners no. 6 and 7 have not been arrested. The petitioners no. 8 to 15 though on interim bail in the first FIR, are in judicial custody pursuant to the remand order passed in the second FIR. To be precise, nine out of fifteen petitioners are in judicial custody whereas remaining six, as per the second supplementary affidavit filed by the petitioners on 27.5.2021, have not been arrested and this position is evident from Annexure No. SA-5 filed therewith.

9. It is an undisputed fact between the parties that a single written information by way of recovery memo presented by opposite party no. 3 (informant) before the police station on 4.3.2021 gave rise to the registration of two FIRs i.e. FIR No. 97 of

2021 under Section 60 of Excise Act, 1910 and the FIR No. 98 of 2021 under Section 420, 467, 468, 471, 477-A IPC. It is also an admitted position before this Court that the contents of the written information presented before the police station was one and the same yet the two FIRs for multiple offences arising out of the same occurrence were registered separately. The registration of second FIR inclusive of fresh investigation pursuant thereto, according to learned counsel for the petitioners, was impermissible in view of the law laid down by the apex court in the case of **T.T.Antony vs State of Kerala & others, (2001) 6 SCC 181**.

10. Learned counsel for the petitioners has submitted that it is the first information registered under Section 154 Cr.P.C. according to which the investigation can go on and any investigation for the same occurrence based on a second FIR is fresh investigation hit by the mandate of law as propounded by the apex court in the judgement referred to above. Therefore, any proceedings in furtherance thereof inclusive of the remand orders passed by the competent court are void ab initio hence the petitioners who are languishing in jail on the strength of the remand orders passed in Case Crime No. 98 of 2021 renumbered as FIR No. 4 of 2021 under Section 420, 467, 468, 471, 477-A IPC and Section 66 IT Act are liable to be released on interim bail.

11. Per contra, the State has filed two short counter affidavits, one sworn on 25.5.2021 and the other on 28.5.2021. In the short counter affidavit filed on 25.5.2021, a specific plea of technical difficulty has been set out to the effect that the information presented by the informant while being uploaded for registration of the FIR did not accept Section 60 Excise Act alongwith the multiple offences under IPC and this is what has occasioned the registration of two FIRs. The exact version set out in the counter affidavit contained in paragraph 6 of the former short counter affidavit is extracted hereunder:

"6. That in the present case, two FIRs had been registered due to technical problem which was faced by the police station Kotwali Dehat, District Saharanpur because the software of CCTNS for registration of FIR was not taking the excise sections invoked in Excise Act alongwith the Sections of IPC and, therefore in the compelling circumstances having no option two FIRs had been registered which are as under:

(i) FIR No. 97 of 2021 under Section 60 of the Excise Act, Police Station Kotwali Dehat, District Saharanpur; and

(ii) FIR No. 98 of 2021 under Section 420, 467, 468, 471, 477-A IPC, Polce Station Kotwali Dehat, District Saharanpur."

12. Insofar as the consequential action of investigation inclusive of remand orders is concerned, it is submitted that the matter has now been considered by the State Government and on having realised the irregularity, it was decided that the second FIR shall henceforth be merged and further investigation shall proceed as a part and parcel of FIR No. 97 of 2021 renumbered by SIT as FIR No. 3 of 2021 for multiple offences. The investigation carried out in the subsequent FIR is, therefore, treated as further investigation for all purposes.

13. It is also submitted that the concerned court has also passed necessary order in this regard and the remand order henceforth shall be obtained in the earliest

information i.e. F.I.R. No. 3/2021 by the SIT.

14. The version set out in the counter affidavit that the second FIR came to be registered on account of a technical difficulty has further been justified on the strength of the documents contained in Annexure SCA-1 to SCA-5 of the short counter affidavit filed on 25.5.2021. The first document i.e. Annexure No. SCA-1 filed alongwith the short counter affidavit is undated. This letter is stated to be issued under the signature of the Incharge of the concerned Police Station i.e. Kotwali Dehat, District Saharanpur addressed to Assistant Excise Commissioner, Meerut Zone, Meerut. The other documents i.e. SCA-2 to SCA-5 were issued on 25.5.2021 and have swiftly moved from one office to another in an unusual manner. The documents also became a part of short counter affidavit sworn on 25.5.2021 itself.

15. All these documents contained in Annexures SCA-1 to SCA-5, on a close scrutiny, clearly show that this exercise undertaken on 25.5.2021 was afterthought, unusual and simply to justify the action on the part of Additional Chief Secretary, Home, U.P. who had transferred the investigation by passing an order on 4.3.2021 wherein the details of both the FIRs transferred to SIT for investigation are mentioned. Interestingly the order dated 4.3.2021 transferring the investigation was passed on the same very date of lodging of the two FIRs arising out of the same occurrence. The competent authority who ought to have thrashed out the illegality, firstly failed to notice a serious lapse on the part of concerned police station and secondly there was absolutely no attempt on his part to streamline the process of investigation as per the mandate of law. Thirdly, the transfer of investigation on the same very day without disclosing any administrative reason securing fairness of investigation speaks of nothing but a deliberate omission of duty apparent on the face of record. Anything prior in point of time than the lodging of criminal case as noticed by Addl. Chief Secretary, Home, U.P. on 4.3.2021, was irrelevant and nothing impinging on the fairness of ongoing investigation has been spelt out that may have warranted the transfer of investigation.

16. To say the least and without impeding the investigation by SIT, it can be safely concluded that the documents i.e. Annexures SCA-1 to SCA-5 placed on record are clearly afterthought and designed to justify an ill intentioned order passed by the Addl Chief Secretary, Home, U.P. on 4.3.2021.

17. This Court in the normal course would not view such a lapse on the part of the highest authority of the department so lightly but in absence of a contest on such an aspect, the Court in the discharge of its legal duty would strike a note of caution and it is expected that an officer positioned as Head of the Department must always act to serve the purpose of law. The majesty of law on sensitive matters like the case at hand could not be compromised. In case the offences of this description at the highest level of department are dealt with selectively, the fate of investigation is bound to suffer leaving a far reaching impact on the administration of criminal justice. The investigating agency, therefore, is cautioned to be fair and independent.

18. The Court would further expect that the administrative order issued on 26.4.2016 by the then DGP as regards

merger of FIRs arising out of the same occurrence, may also be revisited and brought in consonance with law.

19. Having heard learned counsel for the parties, the following issues being relevant in the present case deserve a consideration in the interest of justice:

(1) As to whether two separate FIRs for multiple offences arising out of the same occurrence based on a single written information were rightly registered at the concerned police station and transferred thereafter as separate cases by the State for investigation by SIT;

(2) As to whether the rectification of the irregulairty admitted by the State can be condoned in the facts and circumstances of the case;

(3) As to whether the investigation and the consequential action of remand resorted to in furtherance of FIR No. 98 of 2021 renumbered as FIR No. 4 of 2021 under Section 420, 467, 468, 471, 477-A IPC can be treated to be further investigation for all purposes of the case or the same is liable to be quashed in the present writ proceedings.

20. For the sake of convenience and brevity the question no. 1 and 2 are taken up together for consideration.

21. Sri Siddhartha Luthra, learned Senior Counsel would contend that the procedure prescribed under law once deviated by the State at the threshold would strongly attract the principle viz. once the foundation is not in consonance with law, the subsequent action in furtherance thereof would necessarily fall, therefore, not only that the registration of the impugned FIR No. 4/2021 is illegal in the eye of law but all the consequential proceedings in furtherance thereof to the extent of remand orders are liable to be set aside.

22. To substantiate the argument put forth, learned counsel for the petitioners has further cited the judgement reported in ***(2011) 14 SCC 770 (State of Punjab v. Davinder Pal Singh Bhullar)***. Emphasis is laid on paragraphs 107 to 111. This Court would note that the principle of law laid down by the apex court in the case of T.T. Antony(supra) remains a good law and it cannot be said that a second FIR for one or multiple offences arising out of the same occurrence would lie. This would be contrary to what has been held in paragraph 20 of the judgement in the case of ***T.T. Antony*** which for ready reference is reproduced hereunder:

"From the above discussion it follows that under the scheme of the provisions of Sections 154, 155, 156,157, 162, 169, 170 and 173 of Cr.P.C. only the earliest or the first information in regard to the commission of a cognizable offence satisfies the requirements of Section 154 Cr.P.C. Thus there can be no second F.I.R. and consequently there can be no fresh investigation on receipt of every subsequent information in respect of the same cognizable offence or the same occurrence or incident giving rise to one or more cognizable offences. On receipt of information about a cognizable offence or an incident giving rise to a cognizable offence or offences and on entering the F.I.R. in the station house diary, the officer in charge of a Police Station has to investigate not merely the cognizable offence reported in the FIR but also other connected offences found to have been committed in the course of the same transaction or the same occurrence and file

one or more reports as provided in Section 173 of the Cr.P.C."

23. In the case at hand the distinguishing features as compared to the case of T***.T. Antony*** are that the State in the present case has conceded the irregularity on its part whereas in the case law relied upon, there was a contest and the State went on to support the second F.I.R. arising out the same occurrence and the issue was thus decided as above. It is to be noted that the time gap between the two FIRs in he above judgement unlike the present case was significant which is why the resultant injury to the aggrieved accused was found justiciable by the apex court.

24. Moreover, the principle as emphasized and stated to be followed invariably by the courts of law on the strength of judgement in the case of ***State of Punjab v. Davinder Pal Singh Bhullar (supra)*** is also distant and would not apply in the facts and circumstances of the present case. It is the own case of the petitioners that the earliest FIR alone is to be treated as the information within the meaning of Section 154 Cr.P.C. and it is equally admitted to the parties that the contents of the first FIR are identical to that of the second FIR. Therefore, there is no reason for this Court to assume the foundation of the present case anything other than the earliest FIR which admittedly stands. That being so, the foundation of the present case i.e. the first FIR giving wide powers to investigation does not fall, as such, the argument of foundational collapse has no legs to stand in the facts and circumstances of the present case. The discovery of any material connected to an information registered under Section 154 Cr.P.C., documentary or oral, is a part of investigation or further investigation.

25. It is for this reason that the State has proceeded to rectify the lapse on its part and the technical irregularity that had crept in was removed. The technical lapse has come to be pointed out at a nascent stage of investigation when the rule of double jeopardy neither stood attracted nor can it be termed to be a case of fresh investigation having offended any valuable rights. The petitioners who were subjected to simultaneous investigation would have faced the same consequence in the normal course but for the technical difficulty as explained. The petitioners have also not attributed any mala fides in this regard. The investigating officer has already filed police report against some of the accused persons on 1.5.2021 in FIR No. 97/2021 renumbered by the SIT as FIR No. 3/2021 under Section 60(2) of U.P. Excise Act, 1910 and as against the rest, further investigation is stated to be pending. The State Government by order dated 27.5.2021 has merged the impugned second FIR with FIR No. 3/2021 for carrying out further investigation. The competent court has also passed an order continuing the two proceedings as one in Case Crime No. 3 of 2021 for multiple offences and an order to this effect stated to have been passed on 27.5.2021 is placed on record.

26. Looking to the strong variables mentioned above, which differentiate the present case from the case laws cited, it is thus doubtless that the process of investigation has been streamlined as prescribed under law. The petitioners are no more subjected to separate or double investigation in pursuance of the impugned FIR.

27. The discovery of any material, oral or documentary, after the registration of the earliest FIR under Section 154 Cr.P.C. forms a part of the investigation by virtue of Section 162 Cr.P.C. for filing the police report or supplementary report under Section 173(2) Cr.P.C. Thus, rectification at the nascent stage of investigation being exceptional in the present case deserves acceptance and is condoned for what has been recorded above. The arguments to the contrary fail and are rejected.

28. On the aspect of transfer of investigation, the observation already made would suffice and it is undesirable to reiterate the same. It is expected that further investigation in the matter by SIT shall be carried out in accordance with law and all the culprits involved in the commission of offences are booked for action with promptitude.

29. On question no. 3, learned Senior Counsel has next argued that even if the second FIR and the investigation pursuant thereto has been merged yet it would not rectify the process retrospectively. The remand orders passed by the trial court treating FIR No. 4/2021 as a separate case, nevertheless, are non est and liable to be set aside. The purpose of filing the present writ petition, at least, would not stand frustrated looking to the two interim orders passed by this Court on 25.5.2021 and 27.5.2021, it is argued.

30. This Court may note that the authority of investigation in relation to the cognizable offences lies expansively in the domain of the investigating agency. This Court even does not enjoy supervisory control in this regard. A landmark judgement of the Privy Council in the case of ***Emperor vs. Khwaja Nazir Ahmad [AIR (32) 1945 PC 18***] offers some guidance which has been followed throughout. The relevant passage of the judgement invariably quoted is extracted below:

"In India as has been shown there is a statutory right on the part of the police to investigate the circumstances of an alleged cognizable crime without requiring any authority from the judicial authorities, and it would, as their Lordships think, be an unfortunate result if it should be held possible to interfere with those statutory rights by an exercise of the inherent jurisdiction of the Court."

31. It may be worthwhile to note that even the irregularities in the matter of investigation are saved by virtue of Section 156(2) or Section 460 (a) & (b) Cr.P.C. It is also well settled that the remand orders enabling investigation have no bearing on the trial.

32. This Court for the reasons recorded above has already opined that simultaneous investigation in the present case would not amount to fresh investigation. Interference in a matter where the earliest information prima facie makes out a cognizable offence coupled with the fact that a police report under Section 173 (2) Cr.P.C. has come to be filed against some of the petitioners does not leave any scope for us to interfere in the impugned FIR which no more exists as a separate case. The settled position of law laid down by the apex court in the case of ***State of Haryana v. Bhajan Lal (1992 Supp.(1) SCC 335)*** when tested in the gravamen of this case clearly discourages and resists interference in the exercise of writ jurisdiction. Moreover, the interlocutory remand orders in absence of any specific challenge and having no

bearing on trial are not amenable to the writ of certiorari, hence the third question propounded above is also decided in negative.

33. The petitioners in judicial custody have thus a remedy of bail under Section 439 Cr.P.C. whereas the petitioners who are not arrested are also at liberty to invoke the remedy of anticipatory bail under Section 438 Cr.P.C.

34. The writ petition is accordingly dismissed without prejudice to the remedy as above.

(2021)06ILR A210
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 26.05.2021

BEFORE

THE HON'BLE RAVI NATH TILHARI, J.

Misc. Single No. 11021 of 2021

Savitri Devi & Anr. ...Petitioners
Versus
Addl. Commissioner, Judicial Ii, Lko & Ors. ...Respondents

Counsel for the Petitioners:
Sarvesh Kumar, Hari Om Pandey

Counsel for the Respondents:
C.S.C.

(a) Practice & Procedure - Delay Condonation - The Additional Commissioner failed to examine the day-to day delay of eight years explained in filing the recall application. The matter has been remitted back to examine the correctness of the explanation given by the petitioner on the subject of delay condonation. (Para 16)

Writ Petition Allowed. (E-8)

List of Cited cases:-

1. State (NCT of Delhi) Vs Ahmed Jaan (2008) 14 SCC 582

2. Collector, Land Acquisition, Anantnag & anr. Vs Mst. Kaitji & ors. AIR 1987 SUPREME COURT 1353

3. K. Sabbarayudu & ors. Vs Special Deputy Collector (Land Acquisition) (2017) 12 SCC 840

4. N. Balakrishnan Vs M. Krishmamurthy

5. New India Insurance Co. Ltd. Vs shanti Mishra

6. Brij Indar Singh Vs Kanshi Ram

7. Shakuntala Dei Jain Vs Kunta Kumari

8. Concord of India Insurance Co. Ltd. Vs Nirmala Devi

9. Lala Mata Din Vs A.Narayanan

10. State of Kerala Vs EK. Kuriyipe

11. Milavi Devi Vs Dina Nath

12. O.P. Kathpalia Vs Lakhmir

13. Ummer Vs Pottengal Subida & ors. (2018) 15 SCC 127

(Delivered by Hon'ble Ravi Nath Tilhari, J.)

1. Heard Sri Hari Om Pandey, learned counsel for the petitioners and Sri Raj Bux Singh, learned Additional Chief Standing Counsel for opposite party Nos. 1 to 3 through video conferencing and perused the record.

2. For the order proposed to be passed issuance of notice to opposite party Nos. 4 and 5 is hereby dispensed with.

3. The petitioner has filed this petition for following reliefs:

"1. To issue a writ, direction, or order in the nature of Certiorari quashing of the

impugned order dated 05.04.2021 passed by the Additional Commissioner Judicial Lucknow Region Lucknow in Revision No. 967/2002-03: Savitri Devi and another Vs. Dr. Ram Nrayan Verma. (contain as Annexure No.1)."

2. To issue a Writ, direction, or order in the nature of Mandamus directing the Additional Commissioner Judicial IInd Lucknow Region Lucknow to decide the Revision No. 967/2002-03, Savitri Devi and Another Vs. Dr. Ram Nrayan Verma pending before him on merit.

3. To issue any such other writ, direction, or order as this Hon'ble Court deems fit and proper."

4. Learned counsel for the petitioners submit that the petitioners had purchased land of Gata No. 92 area 0.089 situated in village Mahmudabad Tehsil Mahmudabad, District Sitapur by way of the registered sale deed dated 19.09.1991 and 17.08.1991 from one Mahant Vishan Das and came into possession over the said land. The petitioners application for mutation under Section 33/39 U.P. Land Revenue Act was allowed by the Tehsildar by order dated 21.10.1994, against which the opposite party No.4 filed appeal No. 341/181, which was allowed by order dated 23.10.2002 by the Sub-Divisional Magistrate. The petitioners preferred Revision No. 967/02-03: Savitri Devi and others Versus Dr. Ram Narayan Verma, which was dismissed for non-prosecution by order dated 14.09.2010, against which the petitioners filed an application for setting aside of the order dated 14.09.2010, on 29.03.2019 along with an application for condonation of delay, which has been rejected by the order dated 05.04.2021, under challenge in this petition.

5. Learned counsel for the petitioners submits that the order dated 05.04.2021 has been passed on the ground that there is delay of about eight years in filing of recall application, but the day-to-day delay has not been explained by giving any satisfactory explanation.

6. Learned counsel for the petitioners submits that the petitioners have explained the cause, on account of which the delay occurred, which should have been considered liberally in favour of condonation of delay. The petitioners are poor village ladies and they were assured by their counsel that when the revision was listed for hearing after receipt of the lower court record, he would inform, but as they did not receive any information the petitioners could not appear. He submits that the courts should endeavour to decide the lis on merits, instead of rejection on the ground of limitation. The impugned order is also non-speaking as the cause shown by the petitioners for condonation of delay has not been considered.

7. Learned counsel for the petitioners has placed reliance on the judgment of Hon'ble Supreme Court in the **Case of State (NCT of Delhi) Versus Ahmed Jaan reported in (2008) 14 SCC 582** in support of his submission.

8. Sri Raj Bux Singh, learned Additional Chief Standing Counsel submits that as there is inordinate delay of eight years in filing the application for setting aside the order, the Additional Commissioner rightly rejected the application for recall and for condonation of delay.

9. I have considered the submissions advanced by the learned counsel for the parties and perused the material on record.

10. The proof by sufficient cause is a condition precedent for exercise of extraordinary discretion vested in the

Court. What constitutes sufficient cause cannot be laid down by hard-and-fast rules, but the discretion given by the Section 5 of the Limitation Act, should not be defined or crystallized, so as to convert a discretionary matter into a rigid rule of law. Whether or not there is sufficient cause for condonation of delay is a question of fact dependent upon the facts and circumstances of the particular case.

11. It has been well settled that the term "sufficient cause" is to receive liberal construction to advance substantial justice, when no negligence, inaction or want of bona fide is attributable to the applicant, seeking condonation of delay. The Courts should adopt a justice-oriented approach in condoning the delay, as refusal to condone delay in many cases may result into miscarriage of justice.

12. In **Collector, Land Acquisition, Anantnag and another Vs. Mst. Katiji and others, AIR 1987 SUPREME COURT 1353**, the Hon'ble Supreme Court held that the legislature has conferred the power to condone delay by enacting Section 5 of the Indian Limitation Act, 1963 in order to enable the Courts to do substantial justice to parties by disposing of matters on 'merits'. The expression 'sufficient cause' is adequately elastic to apply the law in a meaningful manner, which subserves the ends of justice. The relevant part of paragraph 3 of the **Collector, Land Acquisition, Anantnag (supra)** is being reproduced as under:-

"3. The legislature has conferred the power to condone delay by enacting S. 5 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:-

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 condoned 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. "

13. In **K. Subbarayudu and others Vs. Special Deputy Collector (Land Acquisition) (2017) 12 SCC 840**, Hon'ble Supreme Court in paragraph 11 has held that the term "sufficient cause" is to receive liberal construction so as to advance substantial justice, when no negligence, inaction or want of bona fides is attributable to the appellants, the Court should adopt a justice-oriented approach in condoning the delay.

14. In the **Case of State (NCT of Delhi) Versus Ahmed Jaan reported in (2008) 14 SCC 582**, upon which the reliance has been placed by learned counsel for the petitioners, also it has been held that Section 5 of the Indian Limitation Act is to be construed liberally to do substantial justice to the parties. It has also been held that what counts is not the length of the delay, but the sufficiency of the cause shown. The relevant part of the paragraph 11 is reproduced as under:

"11. "8. The proof by sufficient cause is a condition precedent for exercise of the extraordinary discretion vested in the court.What counts is not the length of the delay, but the sufficiency of the cause and shortness of the delay is one of the circumstances to be taken into account in using the discretion. In **N. Balakrishnan v. M. Krishmamurthy** it was held by this Court that Section 5 is to be construed liberally so as to do substantial justice to the parties. The provision contemplates that the court has to go in the position of the person concerned and to find out if the delay can be said to have resulted from the cause which he had adduced and whether the cause can be recorded in the peculiar circumstances of the case as sufficient. Although no special indulgence can be shown to the Government which, in similar circumstances, is not shown to an individual suitor, one cannot but take a practical view of the working of the Government without being unduly indulgent to the slow motion of its wheels.

9. What constitutes sufficient cause cannot be laid down by hard-and- fast rules. In **New India Insurance Co. Ltd. v. Shanti Misra** this Court held that discretion given by Section 5 should not be defined or crystallised so as to convert a discretionary matter into a rigid rule of law. The expression 'sufficient cause' should receive a liberal construction. In **Brij Indar Singh v. Kanshi Ram** it was observed that true guide for a court to exercise the discretion under Section 5 is whether the appellant acted with reasonable diligence in prosecuting the appeal. In **Shakuntala Devi Jain v. Kuntal Kumari'** a Bench of three Judges had held that unless want of bona fides of such inaction or negligence as would deprive a party of the protection of Section 5 is proved, the application must not be thrown out or any delay cannot be refused to be condoned.

10. In **Concord of India Insurance Co. Ltd. v. Nirmala Devi** which is a case of negligence of the counsel which misled a litigant into delayed pursuit of his remedy, the default in delay was condoned. In **Lala Mata Din v. A. Narayanan** this Court had held that there is no general proposition that mistake of counsel by itself is always sufficient cause for condonation of delay. It is always a question whether the mistake was bona fide or was merely a device to cover an ulterior purpose. In that case it was held that the mistake committed by the counsel was bona fide and it was not tainted by any mala fide motive.

11. In **State of Kerala v. EK. Kuriyipe** it was held that whether or not

there is sullicient cause for condonation of delay is a question of fact dependent upon the facts and circumstances of the particular case. In **Milavi Devi v. Dina Nath*** it was held that the appellant had sufficient cause for not filing the appeal within the period of limitation. This Court under Article 136 can reassess the ground and in appropriate case set aside the order made by the High Court or the tribunal and renmit the matter for hearing on merits. It was accordingly allowed, delay was condoned and the case was remitted for decision on merits.

12. In **O.P. Kathpalia v. Lakhmir Singh** a Bench of three judges had held that if the refusal to condone the delay results in grave miscarriage of justice, it would be a ground to condone the delay. Delay was accordingly condoned. In Collector, Land Acquisition Vs. Katiji a Bench of two judges considered the question of limitation in an appeal filed by the State and held that Section 5 was enacted in order to enable the court to do substantial justice to the parties by disposing of matters on merits. The expression 'sufficient cause' is adequately elastic to enable the court 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. This Court reiterated that the expression 'every day's delay must be explained' does not mean that a pedantic approach should be made. The doctrine must be applied in a rational, common sense, pragmatic manner. 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. 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 serous risk. Judiciary is not respected on account of its power to legalise injustice on technical grounds but because it is capable of removing injustice and is expected to do so. Making a justice-oriented approach from this perspective, there was sufficient cause for condoning the delay in the institution of the appeal. The fact that it was the State which was seeking condonation and not a private party was altogether irrelevant. The doctrine of equality before law demands that all litigants, including the State as a litigant, are accorded the same treatment and the law is administered in an even-handed manner. There is no warrant for according a step motherly treatment when the State is the applicant. The delay was accordingly condoned."

15. A perusal of the order under challenge shows that the application for condonation of delay has been rejected on the ground that the petitioners did not explain the day-to-day delay. In the case of Collector, Land Acquisition, Anantnag (supra) the Hon'ble Supreme Court has clearly held that "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. Recently in the case of Ummer Vs. Pottengal Subida and Others, (2018) 15 SCC 127, the Hon'ble Supreme Court has held that "one

cannot now dispute the legal proposition that the earlier view of this Court that the appellant was required to explain the delay of each day till the date of filing the appeal has since been diluted by the later decisions of the Apex Court and is, therefore, held as no longer good law".

16. This court finds that the petitioners in their application for condonation of delay indicated reasons for the delay in filing the application for setting aside of the order dated 14.09.2010. The Additional Commissioner (Judicial), Lucknow unfortunately did not deal with those explanations and has merely stated that no justifiable reason has been stated for day-to-day delay. The Additional Commissioner was required to examine correctness of the explanation given by the petitioners in their application and was required to record his specific finding on consideration on those reasons and keeping in view the principles of law, on the subject of condonation of delay, if the explanation furnished by the petitioners was plausible or not and constituted "sufficient cause" or not.

17. In view of the above legal position and the law laid down, I am of the considered opinion that the Additional Commissioner (Judicial) in passing the order under challenge, rejecting the petitioners' application for condonation of delay and consequent thereupon in rejecting the application for setting aside the order dated 14.09.2010 has committed illegality. The cause shown in the application should have been considered and on such consideration, keeping in view the settled law on condonation of delay after recording specific finding if the cause shown was or was not sufficient, the applications should have been decided.

18. For the aforesaid reasons, the order under challenge deserves to be quashed, the writ petition deserves to be allowed and the matter deserves to be remitted to the Additional Commissioner for decision afresh on the petitioners' application for condonation of delay.

19. Accordingly, the petition succeeds and is allowed. The impugned order dated 05.04.2021 passed by the Additional Commissioner (Judicial) Lucknow Region Lucknow-opposite party No.1 in Revision No. 967/2002-03: Savitri Devi and another Vs. Dr. Ram Nrayan Verma. (contain as Annexure No.1) is hereby quashed. The matter is remitted to the court of Additional Commissioner Judicial Lucknow Region Lucknow for decision afresh on the petitioners' application for condonation of delay, in accordance with law keeping in view the observations made hereinabove, with due opportunity of hearing to the parties concerned, expeditiously within a period of three months from the date of providing of copy of this order before the said court. If the application for condonation of delay is allowed the petitioners' application for setting aside of the order dated 14.09.2010 shall also be considered and decided in accordance with law with due opportunity of hearing to the parties concerned.

20. No orders as to costs.

(2021)06ILR A215
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 18.06.2021

BEFORE

THE HON'BLE RAJAN ROY, J.
THE SAURABH LAVANIA, J.

Misc. Bench No. 12227 of 2021

M/S Kkspun India Ltd. ...Petitioner
Versus
U.P. Jal Nigam & Anr. ...Respondents

Counsel for the Petitioner:
Desh Deepak Singh, Abhishek Dwivedi, Anilesh Tewari, Devashish Chauhan, Divyanshu Bhatt, Shashwat Singh

Counsel for the Respondents:

(a) Contract Law - tender document - The tendering authority who is inviting tenders is entitled to prescribe reasonable conditions keeping in mind the kind of person from which he would like to have the bids so as to ensure smooth operation of the contract and its completion without any glitches. If a condition such as Clause 2.2.4 is included in the tender document then the intention of the tendering authority inviting the tender is to avoid participation of any person against whom there may be any criminal proceedings or vigilance enquiry. Such a condition is necessary so as to ensure that the work is performed by bidder who has impeccable and impeachable work. Therefore, such a condition cannot be said to arbitrary or unreasonable. (Para 8)

Writ Petition Rejected. (E-8)

List of Cases cited:-

1. Manoj Narula Vs U.O.I. 2014 (9) SCC 1 *(distinguished)*

2. Michigan Rubber (India) Ltd. Vs St. of Karn. & ors. (2012) 8 SCC 216

(Delivered by Hon'ble Rajan Roy, J.)

1. Heard.

2. By means of this writ petition, the petitioner has prayed for issuance of a writ of Mandamus to direct the respondents to amend Clause 2.2.4 of the tender document in relation to Notice for Invitation of E-Tenders dated 05.04.2021, contained as Annexure No. 2 to this writ petition to the limited extent of withdrawing the provision with respect to non-consideration of "*Any Agency/ Firm or its known Partners/ Directors against which/ whom any investigating authority has instituted any vigilance enquiry or there are criminal proceedings in any Court of law*" for awarding of the tender.

3. The contention of learned Counsel for the petitioner is that insertion of such a condition in the tender document is arbitrary, unreasonable and illegal as it amounts to treating the petitioner guilty whereas there is no judgment of conviction in the criminal proceedings which are pending against the petitioner and as of now as per principles of criminal jurisprudence, the petitioner is to be deemed to be innocent till proved guilty. However, by inserting the aforesaid condition the petitioner has been ousted from the zone of consideration. He says that this condition has been deliberately put for the first time so as to oust the petitioner and it is therefore tailormade to suit certain favoured persons.

4. In support of his contentions Sri Divyanshu Bhatt, learned Counsel for the petitioner relied upon the decision of Hon'ble Supreme Court reported in ***2014 (9) SCC 1 (Manoj Narula Vs. Union of India);*** the judgment of Gujrat High Court in ***Special Civil Application No. 23050 of 2019 dated 10.02.2020*** and a decision of the Allahabad High Court dated 03.04.2012 rendered in ***Writ Petition No. 7447(MB) of 2011***.

5. It is the admitted factual position that FIR No. RC0062017A0026 was lodged by the Central Bureau of Investigation, under Section 120B read with Section 420, 467, 468, 471 IPC and Section 13(2) & 13(1)(d) Prevention of Corruption Act, 1988, wherein a charge-sheet has been filed against the petitioner's

officers/ agents on 15.02.2021 before Court of criminal jurisdiction, although cognizance has not been taken as yet by the said court. It is also an admitted position that the tender document in respect to which a writ of mandamus has been sought for amending Clause 2.2.4 thereof was issued on 05.04.2021 i.e. after the filing of charge-sheet against the petitioner in the Court of Special Judge, Central Bureau of Investigation West Lucknow by the CBI.

6. It is worthwhile to quote the relevant tender conditions of which Clause 2.2.4 is a part. The same reads as under:-

*"**2.2. Prohibition from Bidding**:*

2.2.1. Bidders shall not be under a declaration of ineligibility for corrupt and fraudulent practices by the Central or State Government Department, U.P. Jal Nigam or any public undertaking, autonomous body, authority by whatever name called under the Central or the State Government.

2.2.2. Any bidder having criminal record is not allowed to participate in the bidding process. Any person who is having criminal cases against him or involved in the organised crime or gangster activities or Mafia or Goonda or Anti-social activity are strictly prohibited to participate in the bidding process. If it is established that any bidder has criminal record, his bid shall be automatically cancelled.

2.2.3. Any bidder who is an Advocate and/or Registered with any State Bar Council/ Bar Council of India shall not be allowed to participate in the bidding. If it is established that the contractor is registered with the state bar council, his bid shall be treated as automatically cancelled.

2.2.4. Any agency / firm or its known Partners/ Directors against which/ whom any investigating authority has instituted any vigilance enquiry or there are criminal proceedings in any Court of Law or has been debarred or blacklisted by any Govt./ Semi Govt./Board/ Corporation shall not be considered for award, unless such debarment/ blacklisting period has ended. An affidavit to this effect shall be submitted by the participating agencies / firms.

2.2.5. The bidder shall have to enter into Integrity Pact with U.P. Jal Nigam, he should therefore acquaint himself with the contents of the Integrity Agreement."

7. Petitioner has chosen to challenge only Clause 2.2.4 whereas Clause 2.2.2 also prohibits any bidder having criminal record from participation in the bidding process. It also says that any person who is having criminal cases against him or involved in organized crime or gangster activities or Mafia or Goonda or Anti-social Activities are strictly prohibited to participate in the bidding process and any bidder having criminal record, his bid shall automatically be cancelled.

8. Clause 2.2.4 has already been referred in the context of relief claimed in the writ petition. The said clause says that any Agency/ Firm or its known Partners or Directors against which/ whom any investigating authority has instituted any vigilance enquiry or there are criminal proceedings in any Court of law or has been debarred or blacklisted by any Government/ Semi Government/ Board/ Corporation shall not be considered for award of tender unless such proceedings have ended. Now it is an admitted position that a charge-sheet has been filed in the Court of Special Judge, CBI West Lucknow against petitioner's officers under Sections of relevant Statutes as already referred hereinabove, therefore, by means of this Clause, petitioner is prohibited from submitting his tender bid. The only question to be considered by this Court is as to

whether this condition is arbitrary and unreasonable or not? The ruling cited by counsel for petitioner as rendered by the Hon'ble Supreme Court in the case of ***Manoj Narula vs. Union of India; (2014) 9 SCC 1***; does not relate to a tender document/ contract matter. It in fact relates to a matter pertaining to an election to a public Office. Matters of contract and tender fall in a different realm. The tendering authority who is inviting tenders is entitled to prescribe reasonable conditions keeping in mind the kind of person from which he would like to have the bids so as to ensure smooth operation of the contract and its completion without any glitches. If a condition such as Clause 2.2.4 is included in the tender document then the intention of the tendering authority inviting the tender is to avoid participation of any person against whom there may be criminal proceedings or vigilance enquiry, that is a person regarding whom there may be a cloud as to its functioning etc. The fact that such a person may not have been convicted in the criminal proceedings is not very material as such a tendering authority who is inviting the tender is entitled to have such a condition in the tender document so as to ensure that the work is performed by bidder who has impeccable and unimpeachable record. It can not be said that such a condition is arbitrary or unreasonable. In fact, we would like to refer to a decision, which has been cited by counsel for the petitioner itself in paragraph 16 of the writ petition i.e. ***Michigan Rubber (India) Ltd. vs. State of Karnataka & Ors. (2012) 8 SCC 216***; wherein it has been inter-alia held in paragraph 19(c)- "In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted; (e) If the State or is instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by Court is very restrictive ***since no person can claim fundamental right to carry on business with the Government***."

9. In paragraph 20 Hon'ble the Supreme Court has mentioned the questions which a Court should pose to itself in exercise of power of judicial review, before interfering in tender or contractual matters and they are :- (i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: " the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached"; and (ii) Whether the public interest is affected. If the answers to the above questions are in negative, then there should be no interference under Article 226."

10. Apart from the fact that petitioner has sought a writ of mandamus instead of a writ of certiorari (which would have been the appropriate relief) directing the opposite party to amend Clause 2.2.4, that too, without challenging other similar Clauses such as Clause 2.2.2 but, even if, we ignore this aspect of the matter for a moment, we are of the opinion that merely because of insertion of such a condition, it can not be said that the petitioner has been treated guilty of the criminal offence alleged that too during pendency of the criminal proceedings. As already stated all that such a condition does is to keep out such persons against whom vigilance enquiry or criminal proceedings are pending, which can not be said to be irrational. The tendering authority is entitled not to have business dealings with persons who are undergoing vigilance enquiry or

criminal proceedings. It is a choice which is available to the tendering authority in a matter of award of tender/ contract. This High Court under Article 226 of the Constitution of India or, for that matter, the petitioner can not compel the opposite parties to allow a person against whom vigilance enquiry or criminal proceedings are pending to participate in the tender especially as the petitioner does not have an indefeasible right much less a fundamental right to carry on business with the opposite party as held by the Supreme Court in the case of **Michigan Rubber (supra).**

11. The contention that the condition has been tailormade to favour certain persons it does not have the requisite factual foundation in the writ petition. As already stated, the condition is neither arbitrary nor irrational. It can also not be said that it is against public interest. As observed by the Hon'ble Supreme Court, greater latitude is required to be conceded to the State authorities unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, which we do not find in this case i.e. we do not find any malice or arbitrariness nor that the condition has been deliberately inserted to favour any person. The decisions cited by counsel for petitioner do not help its cause.

12. For all these reasons, we are not inclined to interfere in this matter. We accordingly ***dismiss*** this writ petition.

(2021)06ILR A219
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 07.06.2021

BEFORE

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

P.I.L. Civil No. 11520 of 2021

Gurmeet Singh Soni(Adv.) ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sanjay Awasthi

Counsel for the Respondents:
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A. Public Interest Litigation-Article 226-maintainability of-petitioner raised an issue regarding award of a contract to the private-respondent-petition not espousing the cause of any member of a disadvantageous section of the society or any person, who is downtrodden or for certain disabled person, who is unable to approach the court or that the matter in question relates to infringement or denial of any basic human right to such marginalized section of the society-privte dispute between two waring groups can not be entertained as public interest litigation.(Para 1 to 39)

The PIL dismissed. (E-5)

List of Cases cited:-

1. People's Union for Democratic Rights & ors. Vs U.O.I. & ors. (1982) 3 SCC 235

2. Akhil Bharatiya Soshit Karamchari Sangh(Railway) Vs U.O.I., (1981) 1 SCC 246

3. Bandhua Mukti Morcha Vs U.O.I .& ors. (1984) 3 SCC 161

4. St. of Uttranchal Vs Balwant Singh Chaufal & ors.,(2010) 3 SCC 402

5. Tehseen Poonawalla Vs U.O.I .(2018) 6 SCC 72

6. Narendra Kumar Yadav Vs St.of U.P.,(2020) 11 ADJ 637 LB (DB)

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

1. Heard Shri Sanjay Awasthi and Shri Saksham Singh, learned counsel for the petitioner and Shri H.P. Srivastava, learned Additional Chief Standing Counsel for the State-respondents, through video conferencing.

2. The petitioner has instituted the instant petition in the shape of Public Interest Litigation claiming the following reliefs:-

"(i) Issue a writ, order or command or direction in nature of certiorari summoning (wrongly mentioned as 'summing' in the petition) the record in original and quashing the tender summary report dated 26.05.2021 through which the opposite party no.3 has been declared successful bidder true copy of which is marked as Annexure no.1 to this writ petition.

(ii) Issue a writ, order or command or direction in nature of mandamus directing Opposite Parties No.2 to not to issue letter of intent in lieu of successful bidder."

3. The submission of the learned counsel for the petitioner is that the petitioner is an Advocate and a public spirited citizen. It has further been submitted that the petitioner is concerned about health delivery system in the State of Uttar Pradesh.

4. The petitioner has approached this Court primarily being aggrieved against the actions of the respondents relating to acceptance of the technical bid of the private-respondent no.3 for the purposes of supply of ambulance services in the State of Uttar Pradesh ignoring the fact that the private-respondent no.3 has been blacklisted in the State of Madhya Pradesh.

5. The submission of the learned counsel for the petitioner is that during the second wave of COVID-19 Pandemic, the heath infrastructure was exposed and was found wanting in many spheres. It has also been submitted that in the State of Uttar Pradesh large number of death took place and it is the need of hour that modern and upgraded medical infrastructure be prepared to face any future untoward pandemic or such medical emergency.

6. The learned counsel for the petitioner has further submitted that the respondent no.2 with a view to strengthen and to provide for Advance Life Support Ambulance Services in all the districts of Uttar Pradesh, invited bids from private sector related to Integrated Referral Transport System to be operated round the clock in the State.

7. It has further been urged that Clause 2.1.17 of the tender bidding document specifically state that a prospective bidder should not have failed to perform any contract or be expelled from any project or contract by any public entity or has abandoned or have refused to perform its obligation in any contract.

8. Learned counsel for the petitioner has further submitted that the private-respondent no.3 was providing ambulance services in the State of Madhya Pradesh under the National Health Mission. The services of the private-respondent were found deficient and for the said reason, the National Heath Mission, State of Madhya Pradesh terminated the services by means of the order dated 22.12.2020, a copy of which has been brought on record as Annexure No.3 with the petition.

9. It has also been submitted that the aforesaid deficiencies and discrepancies in the services rendered by the private-respondent no.3 also attracted attention of the print media. The articles published in a section of print media has been brought on record as Annexures No.4 and 5 respectively with the petition. It has also been alleged that the National Health Mission issued a letter to the private-respondent no.3 dated 25.01.2021 imposing penalty which has also been brought on record as Annexure no.6 with the petition.

10. It is in the aforesaid backdrop, it is submitted that the private-respondent no.3, who has a tainted record, his bid could not have been accepted and the State-respondents by ignoring the aforesaid and having accepted the bid of the private-respondent no.3 on 21.05.2021 in effect is not only violating the term of the tender bid but giving a contract of such an important nature to a tainted company as respondent no.3, would jeopardize the purpose for which the contract is to be issued.

11. The services providing ambulance service is of utmost importance and plays a very critical role in saving lives of the persons and especially in view of the expected third wave of COVID-19, such vital services ought not to be granted to such a company and for the said reason the petitioner seeks quashing of the acceptance of the tender bid of the private-respondent no.3 and further relief has been sought that a direction be issued to the respondent no.2 not to issue a letter of intent to the said successful bidder.

12. The learned Additional Chief Standing Counsel for the State-respondents has raised preliminary objections. Shri H.P. Srivastava, learned Additional Chief Standing Counsel submits that the petitioner has not complied with the provisions of Chapter-XXII Rule 1(3-A) of the Allahabad High Court Rules inasmuch as the petitioner has not disclosed his credentials as required.

13. It has further been submitted that the above petition does not appear to be motivated with any public spirit rather it appears to be goaded by oblique motive and appears to be a proxy petition at the behest by some unsuccessful bidder or a third party.

14. To buttress his aforesaid submissions, the learned Additional Chief Standing Counsel has further drawn the attention of the Court to the documents which have been brought on record as Annexure no.3 and 6 particularly and it has been submitted that there is no way the aforesaid documents could not have been in the possession of the petitioner. It has been submitted that Annexure no.3 is a letter, which has been issued by the Mission Director, National Health Mission, Madhya Pradesh and is addressed to the Project Head of Jigitsa Health Care Limited. Similarly, the document which has been brought on record as Annexure no.6 has also been issued by the Deputy Director, Integrated Referral Transport System, National Health Mission, Madhya Pradesh and is addressed to the Project Head, Jigitsa Health Care Limited.

15. It has been urged by the learned Additional Chief Standing Counsel that the said documents have been issued and addressed to a private party. It is not the case of the petitioner that he has obtained the aforesaid documents under the Right to Information Act nor any averment to the aforesaid effect has been stated in the

petition. This clearly indicates that an unsuccessful bidder is attempting to thwart the tendering process by filing the instant petition in the shape of Public Interest Litigation which at the outset reeks of malafides and the pious objective of a Public Interest Litigation is being polluted, accordingly the petition deserves to be dismissed at the threshold.

16. The Court has heard learned counsel for the parties and also perused the record.

17. At the very outset, it will be necessary to notice the object of a Public Interest Litigation. The term Public Interest Litigation has been defined in the Black's Law Dictionary, 6th edition :-

"Public Interest is something in which the public, the community at large, has some pecuniary interest, or some interest by which their legal rights or liabilities are affected. It does not mean anything so narrow as mere curiosity, or as interests of particular localities, which may be affected by matters in question. Interest shared by citizens generally in affairs of local, State or national Government."

18. In, The Major Law Lexicon by P. Ramanatha Aiyar, the Public Interest Litigation has been defined as "lexically the expression 'PIL' means a legal action initiated in a Court of law for the enforcement of public interest or general interest in which the public or a class of community has pecuniary interest or some interest by which their legal rights or liabilities are affected".

19. The Apex Court in the case of ***People's Union for Democratic Rights & Ors. v. Union of India & Ors., reported in (1982) 3 SCC 235*** has defined the Public Interest Litigation as a cooperative or Collaborative effort on the part of the petitioner, the State or public authority and the judiciary to secure observance of the constitutional or legal rights, benefits and privileges upon poor, downtrodden and vulnerable sections of the society.

20. The Public Interest Litigation is an important jurisdiction which is exercised by the Constitutional Courts be it Supreme Court or the High Court. It has well settled that any authority which is vested or endowed with great powers, such authority must exercise the same with great caution and responsibility.

21. The Apex Court as well as the High Courts having found that large sections of the society because of extreme poverty, ignorance, discrimination and illiteracy have been denied justice for time immemorial as they have no access to justice. Predominantly, to provide access to justice to the poor, deprived, vulnerable, discriminated and marginalized section of the society, the Constitutional Courts encouraged and propelled the public interest litigation. This jurisdiction has been created and carved out by judicial creativity and craftsmanship.

22. The Apex Court in the case of ***Akhil Bharatiya Soshit Karamchari Sangh (Railway) v. Union of India, reported in (1981) 1 SCC 246*** in Para-62 has held as under:-

"62. ... Our current processual jurisprudence is not of individualistic Anglo-Indian mould. It is broad-based and people-oriented, and envisions access to justice through "class actions', "public interest litigation' and "representative

proceedings'. Indeed, little Indians in large numbers seeking remedies in courts through collective proceedings, instead of being driven to an expensive plurality of litigations, is an affirmation of participative justice in our democracy. We have no hesitation in holding that the narrow concept of "cause of action' and "person aggrieved' and individual litigation is becoming obsolescent in some jurisdictions." (emphasis in original)

23. The Apex Court in the case of ***Bandhua Mukti Morcha v. Union of India & Ors., reported in 1984 (3) SCC 161*** entertained a petition of even an unregistered association espousing the cause of over downtrodden or its members observing that cause of "little Indians" can be established/espoused by any person having no interest in the matter. In the said public interest litigation where certain workmen were living in bondage and inhuman conditions this cause was brought to the notice of the Court. The Apex Court noticed that it was not expected by the Government that it should raise preliminary objection that no fundamental rights of the petitioner or the workmen on whose behalf the petition has been filed, have been infringed.

24. The Apex Court further noted that the public interest litigation is not in the nature of adversarial litigation but it is a challenge and an opportunity to the Government and its officers to make basic human rights meaningful for the deprived and vulnerable sections of the community and to insure them social and economic justice which is the signature tune of the Constitution.

25. It is in the aforesaid backdrop that it would be seen that the concept of "person aggrieved", was diluted in context of public interest litigation which primarily have been divided in three phases. The Apex Court in the case of ***State of Uttranchal v. Balwant Singh Chaufal & Ors., reported in (2010) 3 SCC 402*** in Para-43 of the said report have noticed the three phases of public interest litigation which is being reproduced hereinafter:-

"43. In this judgment, we would like to deal with the origin and development of public interest litigation. We deem it appropriate to broadly divide the public interest litigation in three phases:

- Phase I.--It deals with cases of this Court where directions and orders were passed primarily to protect fundamental rights under Article 21 of the marginalised groups and sections of the society who because of extreme poverty, illiteracy and ignorance cannot approach this Court or the High Courts.

- Phase II.--It deals with the cases relating to protection, preservation of ecology, environment, forests, marine life, wildlife, mountains, rivers, historical monuments, etc. etc.

- Phase III.--It deals with the directions issued by the Courts in maintaining the probity, transparency and integrity in governance."

26. The Apex Court in the case of ***Tehseen Poonawalla vs. Union of India, reported in (2018) 6 SCC 72*** had the occasions to consider what is a public interest litigation as well as it also noticed the manner in which this noble instrument which was devised by the Courts to cater to the Constitutional obligations in the interest of the public is being misused and its repercussion on the system and the relevant portion reads as under:-

***"96**. Public interest litigation has developed as a powerful tool to espouse the cause of the marginalised and oppressed. Indeed, that was the foundation on which*

public interest jurisdiction was judicially recognised in situations such as those in Bandhua Mukti Morcha v. Union of India [Bandhua Mukti Morcha v. Union of India, (1984) 3 SCC 161 : 1984 SCC (L&S) 389] . Persons who were unable to seek access to the judicial process by reason of their poverty, ignorance or illiteracy are faced with a deprivation of fundamental human rights. Bonded labour and undertrials (among others) belong to that category. The hallmark of a public interest petition is that a citizen may approach the court to ventilate the grievance of a person or class of persons who are unable to pursue their rights. Public interest litigation has been entertained by relaxing the rules of standing. The essential aspect of the procedure is that the person who moves the court has no personal interest in the outcome of the proceedings apart from a general standing as a citizen before the court. This ensures the objectivity of those who pursue the grievance before the court. Environmental jurisprudence has developed around the rubric of public interest petitions. Environmental concerns affect the present generation and the future. Principles such as the polluter pays and the public trust doctrine have evolved during the adjudication of public interest petitions. Over time, public interest litigation has become a powerful instrument to preserve the rule of law and to ensure the accountability of and transparency within structures of governance. Public interest litigation is in that sense a valuable instrument and jurisdictional tool to promote structural due process.

97. Yet over time, it has been realised that this jurisdiction is capable of being and has been brazenly misutilised by persons with a personal agenda. At one end of that spectrum are those cases where public interest petitions are motivated by a desire to seek publicity. At the other end of the spectrum are petitions which have been instituted at the behest of business or political rivals to settle scores behind the facade of a public interest litigation. The true face of the litigant behind the façade is seldom unravelled. These concerns are indeed reflected in the judgment of this Court in State of Uttaranchal v. Balwant Singh Chaufal [State of Uttaranchal v. Balwant Singh Chaufal, (2010) 3 SCC 402 : (2010) 2 SCC (Cri) 81 : (2010) 1 SCC (L&S) 807] . Underlining these concerns, this Court held thus : (SCC p. 453, para 143)

"143. Unfortunately, of late, it has been noticed that such an important jurisdiction which has been carefully carved out, created and nurtured with great care and caution by the courts, is being blatantly abused by filing some petitions with oblique motives. We think time has come when genuine and bona fide public interest litigation must be encouraged whereas frivolous public interest litigation should be discouraged. In our considered opinion, we have to protect and preserve this important jurisdiction in the larger interest of the people of this country but we must take effective steps to prevent and cure its abuse on the basis of monetary and non-monetary directions by the courts."

98. The misuse of public interest litigation is a serious matter of concern for the judicial process. Both this Court and the High Courts are flooded with litigations and are burdened by arrears. Frivolous or motivated petitions, ostensibly invoking the public interest detract from the time and attention which courts must devote to genuine causes. This Court has a long list of pending cases where the personal liberty of citizens is involved. Those who await trial or the resolution of appeals against orders of conviction have a legitimate expectation of

early justice. It is a travesty of justice for the resources of the legal system to be consumed by an avalanche of misdirected petitions purportedly filed in the public interest which, upon due scrutiny, are found to promote a personal, business or political agenda. This has spawned an industry of vested interests in litigation. There is a grave danger that if this state of affairs is allowed to continue, it would seriously denude the efficacy of the judicial system by detracting from the ability of the court to devote its time and resources to cases which legitimately require attention. Worse still, such petitions pose a grave danger to the credibility of the judicial process. This has the propensity of endangering the credibility of other institutions and undermining public faith in democracy and the rule of law. This will happen when the agency of the court is utilised to settle extra-judicial scores. Business rivalries have to be resolved in a competitive market for goods and services. Political rivalries have to be resolved in the great hall of democracy when the electorate votes its representatives in and out of office. Courts resolve disputes about legal rights and entitlements. Courts protect the rule of law. There is a danger that the judicial process will be reduced to a charade, if disputes beyond the ken of legal parameters occupy the judicial space."

27. In view of the law noticed hereinabove and drawing inspiration therefrom, if we examine the averments made in the instant petition as well as the relief claimed, it would be seen that at best it would fall within the third phase of public interest litigation as indicated by the Apex Court in ***Balwant Singh Chaufal (supra).***

28. Considering the fact that the instant petition has been preferred as public interest litigation by a practicing Advocate, it will be necessary to note whether the petitioner has scrupulously complied with the provisions of ***Chapter-XXII Rule 1(3-A) of the Allahabad High Court Rules, 1952*** which has been amended and incorporated w.e.f. 01.05.2010. The relevant Rule (3-A) reads as under:-

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

29. A plain reading of the aforesaid rule would indicate that amongst other disclosure, any person filing a writ petition in shape of Public Interest Litigation must precisely and specifically state his credentials and the public cause he is seeking to espouse. In compliance of the aforesaid rule, the petitioner ought to have stated his credentials clearly.

30. The word "credential" has a specific connotation and means the quality and experience of a person that makes him suitable for doing a particular job. This aspect of the matter has already been noticed by a Coordinate Bench of this Court in the case of ***Narendra Kumar Yadav v. State of U.P., reported in 2020 (11) ADJ 637 (LB) (DB)*** and the relevant portion thereof is reproduced hereinafter:-

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

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

31. The word 'credential' has been defined in Black's Law Dictionary, 8th Edition: "**1**. A document or other evidence that proves one's authority or expertise. **2**. A testimonial that a person is entitled to credit or to the right to exercise official power. **3**. The letter of credence given to an ambassador or other representative of a foreign country. 4. Parliamentary law. Evidence of a delegate's entitlement to be seated and vote in a convention or other deliberative assembly." However, for the present purposes the meaning at S.No.1 above is the most relevant and apt for the purposes of construing Rule 1 (3-A) of Chapter-XXII of Allahabad High Court Rules.

32. Applying the aforesaid principle as well as definition of word "credential" to the instant case, it would reveal that the petitioner in Paragraph-2 has stated that he is a public spirited person and he has no personal and private interest in this public interest litigation. In Paragraph-4, he has made an averment which reads as under:-

"The petitioner is a practicing lawyer of this Hon'ble Court and is very well aware about his duties and rights towards the society and is very much concerned about the prevailing situation of pandemic Covid-19 as many lives have been lost due to pandemic. And the petitioner is concerned about health delivery system in State of Uttar Pradesh."

33. Apart from the aforesaid paragraph, the instant petition does not make any averment regarding the credential of the petitioner. It is nowhere indicated that what public or social work has been done by the petitioner. Moreover, the petitioner being a lawyer and having himself stated that he is well aware of his duties and responsibility towards the society ought to have been more candid and ought to have scrupulously complied with the aforesaid Rule indicating his credential clearly. Apparently, this Court finds that insofar as the question of credential is concerned, there is nothing in the petition indicating the same.

34. Thus, this Court has no hesitation to note that the petitioner has not disclosed any credential. Merely because he is a lawyer does not in any manner grant him any privilege for his petition to be treated differently. Even otherwise, there is nothing on record to indicate that the petitioner has preferred the instant petition espousing the cause of any member of a disadvantageous section of the society or any person, who is downtrodden or for certain disabled person, who is unable to approach the Court or that the matter in question relates to infringement or denial of any basic human right to such marginalized section of the society which enables the petitioner to espouse their cause.

35. On the contrary from the averments in the petition, it indicates that the petitioner is challenging the grant of

contract in favour of the private-respondent no.6. Learned counsel for the petitioner also could not reply as to how he is in possession of the documents particularly Annexure nos.3 and 6 which have been annexed with the petition.

36. Learned counsel for the petitioner could not dispute the fact that the said documents have not been obtained by the petitioner under the Right to Information Act.

37. At this stage, this Court is reminded of the observations made by the Apex Court in the case of ***Balwant Singh Chaufal & Ors. (supra)*** wherein the Apex Court has dealt with the issues of abuse of public interest litigation and the remedial measures by which its misuse can be prevented or curbed and the relevant portion thereof reads as under:-

"143. Unfortunately, of late, it has been noticed that such an important jurisdiction which has been carefully carved out, created and nurtured with great care and caution by the courts, is being blatantly abused by filing some petitions with oblique motives. We think time has come when genuine and bona fide public interest litigation must be encouraged whereas frivolous public interest litigation should be discouraged. In our considered opinion, we have to protect and preserve this important jurisdiction in the larger interest of the people of this country but we must take effective steps to prevent and cure its abuse on the basis of monetary and non- monetary directions by the courts.

144. In BALCO Employees' Union (Regd.) v. Union of India & Others AIR 2002 SC 350, this Court recognized that there have been, in recent times, increasing instances of abuse of public interest litigation. Accordingly, the court has devised a number of strategies to ensure that the attractive brand name of public interest litigation should not be allowed to be used for suspicious products of mischief. Firstly, the Supreme Court has limited standing in PIL to individuals "acting bonafide." Secondly, the Supreme Court has sanctioned the imposition of "exemplary costs" as a deterrent against frivolous and vexatious public interest litigations. Thirdly, the Supreme Court has instructed the High Courts to be more selective in entertaining the public interest litigations.

170. In Dattaraj Nathuji Thaware (supra) this court again cautioned and observed that the court must look into the petition carefully and ensure that there is genuine public interest involved in the case before invoking its jurisdiction. The court should be careful that its jurisdiction is not abused by a person or a body of persons to further his or their personal causes or to satisfy his or their personal grudge or grudges. The stream of justice should not be allowed to be polluted by unscrupulous litigants.

171. In Neetu (supra) this court observed that under the guise of redressing a public grievance the public interest litigation should not encroach upon the sphere reserved by the Constitution to the Executive and the Legislature.

172. In M/s. Holicow Pictures Pvt. Ltd. (supra) this court observed that the judges who exercise the jurisdiction should be extremely careful to see that behind the beautiful veil of PIL, an ugly private malice, vested interest and/or publicity-seeking is not lurking. The court should ensure that there is no abuse of the process of the court.

173. When we revert to the facts of the present then the conclusion is obvious that

this case is a classic case of the abuse of the process of the court. In the present case a practicing lawyer has deliberately abused the process of the court. In that process, he has made a serious attempt to demean an important constitutional office. The petitioner ought to have known that the controversy which he has been raising in the petition stands concluded half a century ago and by a Division Bench judgment of Nagpur High Court in the case of Karkare (supra) the said case was approved by a Constitution Bench of this court. The controversy involved in this case is no longer res integra. It is unfortunate that even after such a clear enunciation of the legal position, a large number of similar petitions have been filed from time to time in various High Courts. The petitioner ought to have refrained from filing such a frivolous petition.

174. A degree of precision and purity in presentation is a sine qua non for a petition filed by a member of the Bar under the label of public interest litigation. It is expected from a member of the Bar to at least carry out the basic research whether the point raised by him is res integra or not. The lawyer who files such a petition cannot plead ignorance."

38. From the perusal of the averments made in the writ petition all what is brought to the fore is that the petitioner is raising an issue regarding award of a contract to the private-respondent. It cannot be discounted that the petitioner may have been set up by the rival group since no credential has been mentioned nor it is a petition which has been filed on behalf of any marginalized section of the society. Any issue which may be in the realm of a private dispute between two waring groups cannot be entertained as a public interest litigation.

39. For the foregoing reasons, this Court is of the considered view that there is no element of public interest involved. Accordingly, the petition cannot be entertained as a public interest litigation and is dismissed. However, in the circumstances, this Court refrains from imposing any costs.

40. That 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.

41. 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)06ILR A228
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.04.2021

BEFORE

THE HON'BLE SARAL SRIVASTAVA, J.

Second Appeal 542 of 2020

Vijay Pal & Ors. ...Appellants
Versus
Rajendra Kumar ...Respondent

Counsel for the Appellant:
Sri Udayan Nandan, Sri Shashi Nandan

Counsel for the Respondents:
Sri Mahesh Sharma, Sri Sharad Sinha, Sri Dinesh Rai

A. Civil Procedure Code,1908 – Section 100 – Second Appeal – Civil Suit seeking mandatory injunction – Maintainability – Bar u/s 331 of U.P.Z.A. & L.R. Act, 1950, applicability thereof – No Declaration under Section 143 of U.P.Z.A. & L.R. Act, 1950, its' effect – Whether jurisdiction lie in Civil Court or in Revenue Court, determining factors to decide it – Non-concurrent finding – Cause of action determines the jurisdiction of a court. It means every fact which will be necessary for the plaintiff to prove, if traversed, in the orders to support his right to the judgment of the court. Therefore, it follows that in each case the cause of action of the suit shall have to be strictly scrutinized to ascertain whether the suit is solely cognizable by a revenue court or is impliedly cognizable by a revenue court – Held, Appellate court has not committed any illegality in concluding that the suit is cognizable by revenue court and not by the civil court. (Para 17, 24 and 32)

B. Practice and Procedure – Civil Suit – Return of the plaint – Civil suit, held not maintainable – Appellate court dismissed the suit and decided the issue on merit itself instead of returning it – Validity – Held, after holding that civil court has no jurisdiction, the only way open was to return the plaint instead of proceeding to decide other issues on merits and dismissing the suit – High Court directed the court below to return the plaint to the plaintiff for presenting it before the court of competent jurisdiction. (Para 33 and 35)

Second Appeal partly allowed. (E-1)

Cases relied on :-

1. Ram Awalamb & ors. Vs Jata Shankar & ors.; AIR 1969 Allahabad 526

2. Ram Padarth & ors. Vs II A.D.J. Sultanpur & ors.; 1989 RD 21

3. Khaderu Ram Teli & ors. Vs Ram Karan Ahir; 1961 ALJ 854

4. Ravi Singhal & ors. Vs Rajeev Goyal & ors.; 2015 (8) ADJ 283

5. Hari Narain Vs 4th A.D.J .Azamgarh; 2000 (1) AWC 416

6. Kamla Shanker Vs IIIrd A.D.J., Mirzapur; 1998 (3) AWC 1708

7. Baiju Vs Sambhu Saran; 1963 All LJ 1064

8. Ram Padarth & ors. Vs II A.D.J., Sultanpur; 1989 RD 21

9. Khaderu Ram Teli & ors. Vs Ram Karan Ahir; 1961 ALJ 854

10. Hari Narain Vs IVth A.D.J., Azamgarh; 2000 (1) AWC 416

11. Kamla Shanker Vs IIIrd A.D.J., Mirzapur; 1998 (3) AWC 1708

12. Baiju Vs Shambu Saran; 1963 All LJ 1064

13. Ravi Singhal & ors. Vs Rajeev Goyal & ors.; 2015 (8) ADJ 283 (DB)

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

1. Heard Shri Udayan Nandan, learned counsel for the appellants and Shri Dinesh Rai, Advocate holding brief of Shri Mahesh Sharma, learned counsel for the respondent.

2. The plaintiff-appellants have preferred the present second appeal challenging the judgement and decree dated 2.11.2020 passed by the appellate court setting aside the judgement dated 24.9.2016 passed by the trial court decreeing the original suit No. 217 of 2007 (Vijay Pal and others vs. Rajendra Kumar).

3. The brief facts of the case are that the plaintiff-appellants instituted original suit No. 217 of 2007 praying for a decree of mandatory injunction restraining the defendant-respondent from peaceful interference in his possession over plot No. 387 area 0.265 hectare situated in Village Aurangabad Ahir Pargana Agauta, Tehsil & District Bulandshahr. The plaint case was that

Buddhi Singh was the owner of the plot No. 387 area 2 bigha 10 biswa situated in Village Aurangabad Ahir Pargana Agauta, Tehsil & District Bulandshahr. One Ajeet Singh and Virendra Singh son of Risal Singh, Buddhi Singh son of Jagat Singh and Jal Singh son of Meer Singh are the descendants of zamindar Fatah Chandra. They had instituted original suit No. 262 of 1991 praying for decree of declaration that they are the owner and in possession over plot No. 387 (hereinafter referred to as 'property in question). Besides above, Ajeet Singh and another instituted another suit praying that their names be recorded in the records in respect of property in question based on decreed dated 7.9.1993. The plaintiff-appellants claim that they and Ajeet Singh belong to one family but Ajeet Singh without informing the plaintiff-appellants got the aforesaid two suits decreed whereas the plaintiff-appellants are also the owner and in possession of the property in question. It is also pleaded that the name of the defendant-respondent has been fraudulently recorded in the records. The defendant-respondent being influential persons are trying to interfere in the peaceful possession of the plaintiff-appellant which gave rise to the cause of action for filing the present suit.

4. The suit was contested by the defendant-respondent by filing a written statement denying the allegation of the plaint. In the additional plea, the defendant-respondent pleaded that the gata No. 387 is a big plot having an area of 0.632 hectares out of which 0.367 hectares is recorded in the name of Ajeet and the name of the defendant-respondent is recorded with respect to 0.265 hectares of the said gata in khasara and khatauni. The defendant-respondent specifically stated that the name of the plaintiff-appellants is not recorded in any of the revenue records. They also pleaded that the property in question is agricultural land and as there is no declaration under Section 143 of U.P.Z.A. & L.R. Act by the competent authority, consequently, the suit is barred by Section 331 of U.P.Z.A. & L.R. Act. The defendant-respondent also pleaded that the property in question has been allotted to him by Gaon Sabha after following due procedure.

5. The plaintiff-appellants filed a replication stating therein that no declaration under Section 143 of the U.P.Z.A. & L.R. Act is required as the Abadi on the land in question is old. Therefore, the suit is not barred by Section 331 of U.P.Z.A. & L.R.Act.

6. The defendant-appellants filed an additional written statement contending inter-alia that in a suit for injunction, the declaration of rights of the plaintiff-appellants is also involved. It is further pleaded that the name of the plaintiff-appellants is not recorded in the revenue record. Consequently, the suit is not maintainable being barred by Section 331 of the U.P.Z.A. & L.R. Act.

7. On the basis of pleading, the trial court has framed as many as 11 issues which read as under:-

"1. क्या वादीगण वादगत सम्पत्ति खेत सं0 387 रकबई 0.265 है0 के मालिक, काबिज व दाखील है और उक्त भूमि पर वादीगण की आबादी ए, बी, सी, डी कायम है ? यदि हॉ तो प्रभाव ?

2. क्या प्रतिवादी संख्या 02 का नाम वादगत नम्बर 387 पर गलत किातवत व फर्जी रुप से दर्ज हुआ है ? यदि हॉ तो प्रभाव ?

3. क्या मूलवाद संख्या 262/91 का वर्तमान वाद पर कोई प्रभाव है ?

4. क्या वादीगण को कोई वाद कारण प्राप्त नही है ?

5. क्या वाद का मूल्यांकन कम किया गया है ?

6. क्या प्रदत्त न्यायालय शुल्क कम है ?

7. क्या वादगत सम्पत्ति पर धारा 143 व 331 यू0 पी0 जैड0 ए0 एक्ट का प्रभाव है और न्यायालय को वाद सुनने एवं निर्णीत करने का क्षेत्राधिकार नही है ?

8. क्या वाद में आवश्यक पक्षकार न बनाये जाने का दोष है ?

9. क्या वादीगण ने वादगत सम्पत्ति की विवरण सही प्रकार नहीं दिया है, जैसा कि अतिरिक्त प्रतिवाद पत्र 66.ए–1 में कथन किया गया है ?

10– अनुतोष ?

11– क्या वादीगण का वाद आदेश 07 नियम 11 सी0 पी0 सी0 के प्राविधानों से बाधित है ?"

8. The trial court decided the issue Nos. 1 to 3 and 9 jointly. In deciding the said issue, the trial court considered the plaint of original suit No. 262 of 1991 to conclude that the reading of the plaint of original suit No. 262 of 1991 reveals that Ajeet Singh has stated in the plaint that ancestors of Ajeet Singh etc. and others planted trees on the plot in question which explains that besides Ajeet Singh, there were several other members in the family, and the evidence filed by the plaintiff-appellants points that the reference of other persons made by Ajeet Singh in the plaint of original suit No. 262 of 1991 was in respect of plaintiff-appellants. Accordingly, the trial court held that the defendant-respondent would not get any benefit if the name of the plaintiff-appellants is not recorded in the revenue record. The trial court further held that the plaintiff-appellants proved his ownership over the property in question. The trial court, thereafter, proceeded to consider other evidence on record and held that the plaintiff-appellants are in possession of the property in question.

9. The trial court while deciding issue No. 7 regarding maintainability of the suit held that the right of the plaintiff-appellants concerning peaceful possession over the property in question will not extinguish only for the reason that no declaration under Section 143 of U.P.Z.A. & L.R. Act has been obtained. The trial court further held that the plaintiff-appellants have prayed for a decree of mandatory injunction restraining the defendant-respondent from peaceful interference in the property in question, therefore, the suit is cognizable by the civil court and is not barred by Section 331 of U.P.Z.A. & L.R. Act.

10. Feeling aggrieved by the order of the trial court, the defendant-respondent preferred civil appeal No. 278 of 2016 before the Additional District Judge, Fast Track Court No. 4, Bulandshahr. The appellate court noticed that the name of the plaintiff-appellants are not recorded in any revenue record and the finding of the trial court in respect of ownership is perverse as no evidence was led by the plaintiff-appellants to prove his ownership. The appellate court further considered various pronouncement of this Court as to when the suit in respect of agriculture land is maintainable in civil court. After appreciating the facts of the case and law, the appellate court concluded that mandatory injunction can be granted only after the decree for declaration of title in respect of the property in question is granted to the plaintiff-appellant. Accordingly, it held that the suit is not maintainable before the civil court and is cognizable by revenue court. Consequently, the appellate court set aside the judgement and order of the trial court on the ground that the suit is barred by Section 331 of the U.P.Z.A. & L.R. Act. and dismissed the suit.

11. Challenging the aforesaid order, learned counsel for the appellants has raised the following two questions which according to him are the substantial

question of law which warrants an answer from this Court under Section 100 of C.P.C.; (i). whether the appellate court has erred in law in holding that the suit is not maintainable by the civil court and is barred by Section 331 of U.P.Z.A. & L.R. Act, (ii). when once the lower appellate court has found that the suit is not maintainable before the civil court, whether it was justified in dismissing the suit instead of returning the plaint to the plaintiff-appellants to present it before the appropriate court.

12. In support of question of law No. 1, counsel for the appellants has submitted that from the relief claimed in the suit, it is evident that the plaintiff-appellants have prayed for a decree of mandatory injunction restraining the respondents from interfering in peaceful possession of the plaintiff-appellants over the property in question. Since the suit is only for a decree of mandatory injunction, therefore, the suit is cognizable by the civil court and is not barred by Section 331 of the U.P.Z.A. & L.R. Act. He submits that the appellate court has committed a manifest error of law in recording a finding that since the name of the plaintiff-appellants is not recorded in revenue record, therefore, the plaintiff-appellants will have to obtain a decree for declaration which can only be granted by the revenue court, hence, the suit is barred by Section 331 of U.P.Z.A. & L.R. Act. In support of his contention, he has placed reliance upon the following judgments of this Court :

(i) Ram Awalamb and others Vs. Jata Shankar and others, AIR 1969 Allahabad 526

(ii) Ram Padarth and others Vs. Second Additional D.J. Sultanpur and others, 1989 RD 21

(iii) Khaderu Ram Teli and others Vs. Ram Karan Ahir, 1961 ALJ 854.

13. In respect of the second question raised by him, he has placed reliance upon the judgement of this Court in **Ravi Singhal and others Vs. Rajeev Goyal and others, 2015 (8) ADJ 283.**

14. Per contra, the counsel for the respondent contended that it is admitted on record that the name of the plaintiff-appellants are not recorded in the revenue record, therefore, relief of mandatory injunction can be granted only when the plaintiff seeks decree for declaration of title in respect of property in question. Therefore, the suit involves decree for declaration of title which relief can be granted by the revenue court. Accordingly, he submits that the suit is not maintainable before the civil court and the appellate court has rightly dismissed the suit. In support of his contention, he has placed reliance upon the following judgements:-

(i) Hari Narain Vs. 4th ADJ Azamgarh, 2000 (1) AWC 416.

(ii) Kamla Shanker Vs. IIIrd Additional District Judge, Mirzapur, 1998 (3) AWC 1708.

15. He further contends that the Full Bench of this Court in **Ram Awalamb (supra)** does not come in aid to the plaintiff-appellants since the judgement of this Court in **Baiju Vs. Sambhu Saran 1963 All LJ 1064** squarely covers the present case which has been noticed by the Full Bench in paragraph No. 73 of the judgement and the Full Bench has not overruled the judgment of **Baiju (Supra)** of this court, therefore, the appellate court has rightly held the suit is not maintainable by the civil court. He further submits that

once the appellate court has held that the suit is not cognizable by the civil court, it has rightly set aside the order of the trial court and dismissed the suit of the plaintiff-appellants.

16. I have heard the counsel for the parties and perused the record.

17. To determine the question of jurisdiction in respect of maintainability of the suit, the Full Bench judgement of this Court in the case of **Ram Awalamb (supra)** held that cause of action determines the jurisdiction of a court. The cause of action means every fact which will be necessary for the plaintiff to prove, if traversed, in the orders to support his right to the judgment of the court. Therefore, it follows that in each case the cause of action of the suit shall have to be strictly scrutinized to ascertain whether the suit is solely cognizable by a revenue court or is impliedly cognizable by a revenue court.

18. The Full Bench in paragraph No. 50 after considering the Section 331 of U.P.Z.A. & L.R. Act has elaborated when the jurisdiction of civil court is barred. The relevant portion of paragraph No. 50 is extracted herein below:-

"50.....Thus the jurisdiction of a civil court shall be barred in respect of suits based on a cause of action for any of the reliefs

(a) mentioned in column 4 of Schedule II as being cognizable by revenue court, or

(b) if on the same cause of action any relief could be obtained by means of any suit or application mentioned in column 4 of Schedule II of the Act, the relief asked for from the civil court may or may not be identical to that which the revenue court would have granted. In other words, (a) above relates to the class of cases where the jurisdiction of civil court is specifically barred. Under Clause (b) falls that class of cases where the jurisdiction of the civil court is impliedly barred."

19. Paragraph No. 57 of the judgement of Full Bench explained when a suit is cognizable by revenue court. Paragraph No. 57 of the judgement is extracted herein below:-

"57. Where in a suit, from a perusal only of the reliefs claimed, one or more of them are ostensibly cognizable only by civil court and at least one relief is cognizable only by the revenue court, further questions which arise are whether all the reliefs are based on the same cause of action and, if so, (a) whether the main relief asked for on the basis of that cause of action is such as can be granted only by a revenue court, or (b) whether any real or substantial relief (though it may not be identical with that claimed by the plaintiff) could be granted by the revenue court. There can be no doubt that in all cases contemplated under (a) and (b) above the jurisdiction shall vest in the revenue court and not in the civil court. In all other cases of a civil nature the jurisdiction must vest in the civil court."

20. Paragraph No. 62 of the judgement is also relevant in the context of the present case and is accordingly reproduced herein below:-

"62. The case law in this Court on this point might be classified under the following two heads:--

(a) Where several reliefs closely connected with each other can be claimed on the basis of the cause of action set forth in the plaint it has to be examined which of them is the main relief and which others are ancillary

reliefs. If upon a consideration of facts constituting the cause of action the main relief is such which can be granted by the civil court the suit will be cognizable in the civil court which will proceed to grant the ancillary reliefs also. On the other hand if the main relief is specifically cognizable by a revenue court only but ancillary reliefs may be such as could be granted by the civil court the matter was cognizable only by a revenue court.

(b) The pith and substance of the allegation made in the plaint constituting the cause of action must be scrutinized in order to determine whether or not if on the same cause of action any adequate or satisfactory alternative remedy could be available to the plaintiff in the revenue court. If the answer to the scrutiny be in the affirmative, then the suit brought in the civil court must fail regardless of the consideration that in respect of the reliefs actually claimed the suit was on the face of it cognizable by a civil court."

21. From the reading of paragraph No. 62 of the judgement, it is clear that the true nature of the allegation made in the plaint constituting the cause of action must be evaluated to determine whether the plaintiff has any adequate or satisfactory alternative remedy on the same cause of action in the revenue court. If the answer is in the affirmative, then the suit is cognizable by the revenue court and it is immaterial that the suit in respect of reliefs claimed on the face of it is cognizable by the civil court.

22. Paragraph No. 73 of the judgement of **Ram Awalamb (supra)** is also relevant in the present case and is being extracted herein below:-

"73. The case of Baiju v. Shambhu Saran. 1963 All LJ 1064 decided by a Division Bench of this Court was for injunction based on the allegations that the plaintiff was a khudkasht holder but the defendant had got his name entered in the revenue papers and was interfering with his possession. The defendant claimed to be the tenant in possession. The lower appellate court granted the decree of injunction. The second appeal filed before the High Court was allowed on the ground that the civil court had no jurisdiction to decide the case because upon the facts of the case it was clear that the plaintiff must seek a declaration as to his title and, therefore, the suit was one in which relief could be granted by the revenue court."

23. Paragraph No. 76 of the judgement of **Ram Awalamb (supra)** explicates the points for consideration for determining the jurisdiction of the court for entertaining the suit. Paragraph No. 76 of the judgement is extracted herein below:-

"76. The main point for consideration In all cases where on a definite cause of action two reliefs can be claimed is which of the two reliefs is the main relief and which relief or other reliefs are ancillary reliefs. Where from facts and circumstances of the case the relief for demolition and injunction is the main relief there could be no reason why the jurisdiction of the civil court should be barred On the other hand if it could be said that the main relief that is to say, the real and substantial relief, could on that cause of action be of possession only then the suit will definitely lie in the revenue court. In our opinion it is difficult to lay down any hard and fast rule that where the suit is brought against a trespasser the only relief which the plaintiff should claim as an effective relief is that of possession and he need not try to obtain an injunction order and get the constructions made by the

trespasser demolished. The revenue courts have not. been empowered to grant the reliefs of injunction and demolition and in case the defendant refuses to take away the materials from the land in dispute after the decree for possession has been passed against him the main object of the plaintiff would be frustrated. A civil court will, therefore, have the power to entertain the suit where the. main relief sought by the plaintiff is that of injunction and demolition, a relief which could be granted by the civil court only. The relief of possession will be merely ancillary relief which the civil court could grant after having taken cognizance of the suit for injunction and demolition. We respectfully agree with the view expressed by Dayal and Seth, JJ. in the case of 1966 All LJ 1084, (AIR 1967 All 358) that once the suit is maintainable for the main relief in the civil court then there is no bar for the civil court to grant all possible reliefs flowing from the same cause of action. We, however, with great respect, differ from the view taken by the Division Bench in the case of 1965 All LJ 1137 that whenever a suit is for demolition and possession against a trespasser it must always be held that the main relief was that of possession. We are of the view that the determination of the question as to which out of the several reliefs arising from the same cause of action is the main relief will depend on the facts and circumstances of each case."

24. The judgement of the Full Court in **Ram Awalamb** (supra) in pith and substance explains what the court should consider in determining the question of jurisdiction. It also defines the cause of action which means that bundle of essential facts necessary for the plaintiff to prove before he can succeed. Consequently, it follows that to ascertain the jurisdiction of the court, the court must strictly scrutinize the cause of action to determine whether the suit is cognizable by a revenue court or is impliedly cognizable only by a revenue court, or is cognizable by a civil court.

25. The other judgements **Ram Padarth and others vs. Second Addl. D.J., Sultanpur, 1989 RD 21 and Khaderu Ram Teli and others Vs. Ram Karan Ahir, 1961 ALJ 854** on which emphasis has been laid by counsel for the appellants, also reiterates the same proposition.

26. Now this Court considers the judgement relied upon by counsel for the respondent on the issue of maintainability of a suit before the civil court. In **Hari Narain Vs. IVth Additional District Judge, Azamgarh, 2000 (1) AWC 416**, this Court has held that where the title of the plaintiff is disputed and the reading of the plaint also discloses so. In such an event, the plaintiff must allege how he acquired the right and interest in the property before he could pray for a permanent injunction which could be established by declaration of the right claimed by the plaintiff, and once the court comes to this conclusion, the irresistible inference would be that the suit was really in the nature of declaration under Section 229-B of the U.P.Z.A. & L.R. Act and thus cognizable by revenue court and not by the civil court. Paragraph No. 13 of the judgement is extracted hereinbelow:-

"13. From what has been discussed above, it appears that It was not the admitted case of the title of the plaintiff over the suit property, even according to the mere reading of the plaint. Thus, the plaintiff was obliged to allege how he obtained a right on the suit property or

what was the obligation in his favour in respect thereof before he could make a prayer for a permanent injunction. That could have been established by a declaration of the right claimed by the plaintiff and once we come to this conclusion, the irresistible inference would be that the suit was really in the nature of one spoken of under section 229B of the U.P.Z.A. and L.R. Act and was, thus, cognizable by the revenue court and as such, the jurisdiction of the civil court stood ousted."

27. In the case of **Kamla Shanker Vs. IIIrd Additional District Judge, Mirzapur, 1998 (3) AWC 1708**, the order of the trial court and revision court was assailed before this Court. This Court found that the names of the defendants have been recorded in the revenue record while petitioners name do not find place in the revenue record, therefore, the suit is cognizable by the revenue court not by the civil court. Accordingly, this court upheld the judgement of the court below. This Court in paragraph Nos. 4 & 5 detailed the reasons for concluding that the judgement of the court below is correct. Paragraph Nos. 4 & 5 of the judgement are extracted herein below:-

"4. Section 331 of the said Act prescribes that no Court other than a Court mentioned in Column 4 of Schedule II shall take cognizance of any suit in respect whereof provisions have been made in the said Act providing procedure and forum for obtaining such relief. The exclusion is clear and un-ambiguous. While expression 'except as provided by or under this Act no Court other than a Court mentioned in column 4 of Schedule II shall, notwithstanding anything contained in the Civil Procedure Code, 1908 (V of 1908), take cognizance of any suit, application, or proceedings based on a cause of action in respect of which any relief could be obtained by means of any such suit or application".

5. Now Schedule II in Sl. No. 23 provides in column No. 3 that suit for injunction or for repair of the waste or damage prescribing the forum as Assistant Collector 1st Class in column 4 and provisions for first appeal and second appeal before Commissioner and Board respectively in column Nos. 5 and 6. Thus, it appears that suit under Section 208 of U. P. Zamindari Abolition and Land Reforms Act is provided in Schedule II prescribing the forum within the meaning of Section 331 of the said Act. By reason of exclusion of civil court provided under Section 331 expressly and the suit having been a suit under Section 208 of the U. P. Zamindari Abolition and Land Reforms Act fall within SI. No. 23 of Schedule II providing for relief in respect of the cause of action provided in column 3 before the revenue court. The Jurisdiction of civil court is barred."

28. Now, this Court proceeds to analyze the judgement of the appellate court in the light of principles elucidated by the court for determining the jurisdiction of a court. According to the plaintiffs' case in the plaint, he belongs to the family of Ajeet Singh. Ajeet Singh and other persons instituted two suits, one in civil court numbered as original suit No. 262 of 1991 seeking a declaration that they are the owner and in possession of the property in question and another suit before the revenue court for recording their names in the revenue record. The plaintiff-appellants admits in paragraph Nos. 3 & 4 of the plaint that Ajeet Singh and others got the aforesaid two suits decreed without

informing the plaintiff-appellants. It is further averred in paragraph No. 7 of the plaint that the respondent by playing fraud has got their names recorded in revenue record in respect of the property in question. It is further averred that cause of action for filing the suit arose when the defendant-respondent started illegally interfering in the peaceful possession of the plaintiff-appellants.

29. Specific case of the defendant-respondent in the written statement is that he became the owner of part of the gata No. 387 under allotment by the Gaon Sabha. It is also the case of the defendant-respondent that the plaintiff-appellants has no interest in the property in question and accordingly, the suit is not cognizable by the civil court.

30. However, the case of the plaintiff-appellants are that they are the owner and in possession of the property in question, but pleadings of paragraph Nos. 3, 4 & 7 of the plaint reveals that the name of plaintiff-appellants is not recorded in the revenue record. It is also admitted by them that the name of the defendant-respondent is recorded in the revenue records. It is a different matter that the question as to whether the allotment of property in question to the defendant-respondent by Gaon Sabha was as per law. The said question is engaging the attention of this Court in Writ-B No. 5625 of 2018, but the plaintiff-appellants cannot take advantage of the weakness of the case of the defendant-respondent. The plaintiff-appellants has to stand on their leg. If the pleadings of the plaint disclose that the title of the plaintiff-appellants over the property in question is doubtful or plaintiff appellants are not certain about their title over the property in question, in such case, the plaintiff-appellants in order to succeed has to seek a decree of declaration of title.

31. Thus, the contention of counsel for the appellants that it is a suit for injunction which is cognizable by a civil court based on Full Bench judgment in the case of **Ram Awlambh (supra)** is not sustainable for the reason that the title of the plaintiff is not admitted by the defendant and further, the plaint does not disclose as to how the plaintiff-appellants acquired the title over the property in question. It is also pertinent to note that the plaintiff-appellants did not adduce any evidence to prove that they belong to the family of Ajeet Singh and are the owner of the property. Accordingly, this court finds that the trial court committed a manifest error of law in holding that the plaintiff-appellants belong to the family of Ajeet Singh without there being any assertion in this respect in the plaint of original suit No. 262 of 1991. Consequently, this Court is of the opinion that the appellate court has rightly held that the aforesaid finding of the trial court is perverse and not sustainable. This court is further of the opinion that the controversy in hand is covered by the judgment of this court in **Baiju Vs. Shambu Saran, 1963 All LJ 1064** referred in paragraph np. 73 of the full judgment of Ram Awalamb and judgment of **Hari Narain (Supra).**

32. Thus, for the reasons given above, this Court finds that the appellate court has not committed any illegality in concluding that the suit is cognizable by revenue court and not by the civil court. Therefore, question No. 1 is answered against the plaintiff-appellants.

33. As far as question No. 2 is concerned, this Court finds that the same is covered by the judgement of this Court in the case of **Ravi Singhal and others Vs. Rajeev Goyal and others, 2015 (8) ADJ**

283 (DB). Paragraph No. 11 of the judgement is extracted herein below:-

"11. In view of above exposition of law and considering the fact that Court below has correctly came to the conclusion that in respect to orders passed under the provisions of Act, 1972, Civil Court in a suit under Section 9 C.P.C., has no jurisdiction to declare orders passed by competent authority under Act, 1972 illegal, it had not authority to proceed to decide other issues on merits. In our view, the Court below has rightly held that it had no jurisdiction to try the suit. In these circumstances, the only way open to it was to return the plaint instead of proceeding to decide other issues on merits and dismiss the suit. "

34. Accordingly, this Court finds merit in the submission of learned counsel for the appellants and modify the order of the appellate court.

35. For the reasons given above, this Court maintains the order and judgment of the appellate court holding that the suit is not cognizable by the civil court but set aside the part of the order of the appellate court by which it has dismissed the suit. Accordingly, this Court directs the court below to return the plaint to the plaintiff-appellants for presenting before the court of competent jurisdiction.

36. For the reasons given above, the second appeal is **partly allowed** with no order as to costs.

(2021)06ILR A238
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 21.06.2021

BEFORE

THE HON'BLE RAJNISH KUMAR, J.

Consolidation No. 2252 of 1982

Ram Naresh Misra ...Petitioner
Versus
Sita Ram & Ors. ...Respondents

Counsel for the Petitioner:
Hargur Charan, D.S. Pandey, V.K. Srivastava

Counsel for the Respondents:
C.S.C., H.S. Sahai, R.A. Misra, Uma Shankar Sahai

A. Civil Law - Consolidation of Holdings Act, 1953-Section 9(2)-co-tenureholders-dispute relating to Gata-petitioner's name was recorded as Bhumidhar of Gata in basic year of consolidation along with co-tenureholders-issuance of PA-10 was mandatory at the relevant point of time but none of the courts below have recorded a single finding that the PA-10 was issued in accordance with the procedure under the Land Records Manual-finding of the C.O. that the requirement of PA-10 has been fulfilled by the objection of the petitioner-if any entry is made in PA-10, same shall be communicated to the person or their heirs and obtain their signatures-court below failed to consider that the name of the petitioner was recorded as Bhumidhar in basic year entry therefore, the objection was required to be filed by the respondent no.1 asserting claims against the true owner which he failed to do.(Para 1 to 30)

B. the period of limitation prescribed for the suit , for ejectment of a trespasser u/s 209 of the Act 1950 was six years during the period 1969 to 1971, and it was increased to 12 years by notification dated 14.10.1971-therefore, suit filed by the petitioner was within limitation-therefore, respondent no.1 is not entitled for benefit of section 210 of the Act, 1950.(Para 28,29)

C. It is settled principle of law of adverse possession that the person who claims title over the property on the strength of adverse possession and thereby wants to diverse the true owner of his ownership rights over

such property is required to prove his case only against the true owner of the property. In the present case the respondent no.1 neither filed any objection against the record published during consolidation proceedings claiming the right of adverse possession nor accepted the ownership of the petitioner therefore he is not entitled to be recorded on the basis of adverse possession. (Para 26)

The petition is allowed. (E-5)

List of Cases cited:

1. Babu Lal Vs DDC/A.D.M. & ors, Writ-B No. 43960 of 2013

2. Balchan & 2 ors. Vs DDC & ors., Writ-B No.13437 of 2015

3. Dagadabai(Dead) by L.Rs. Vs Abbas @ Gulab Rustam Pinjari(2017) 136 RD 552/2017(13) SCC 705

4. Ram Janam(Dead) Vs DDC,Gazipur & ors. (2003) Suppl RD 571,

5. Ran Singh Vs DDC & ors; Manu/UP/0893/2005/ 2005(99) RD 324

6. Shri Uttam Chand (D) Thru L.Rs. Vs Nathu Ram(D) Thru L.Rs.AIR Online (2020)SC 35

7. Karnataka Board of Wakf Vs GOI & ors. (2004) 10 SCC 779: Manu/SC/0377/04, Putti & ors. Vs Asst. Dir, Consolidation , Bahraich & ors. (2007) 2 ALJ 143

8. Shri Nath Vs The DDC,Ghazipur & anr. (1982) SCC Online All 980

9. Sheo Mangal Lal Vs DDC & ors. (1978) SCC Online All 655

10. Chandi Prasad(Dead) Thru L.Rs. Vs DDC, Kanpur & ors (2011) 114 RD 663

11. Virendra Nath Thru P.A. Holder R.R. Gupta Vs. Mohd. Jamil & ors,MANU/SC/0537/2004/ AIR 2004 SC 3856

12. Prem Narain & anr. Vs . Shiv Pati & ors., (2004) 22 LCD 1638.

13. Chunni Vs St. of U.P. & ors., MANU/UP/2826/2015/ 2016 (130) RD 617

14. Smt Jagwanta Vs Smt. Nirmala & ors, MANU/UP/0737/1982/1982 AWC 591(ALD)

15. Mohd. Raza Vs DDC & anr. R.D. 1997(R.D.) 276

16. Gurumukh Singh & ors. Vs DDC, Nainital & ors. (1997) 80 RD 276,

17. Jamuna Prasad Vs. Deputy Director of Consolidation, Agra & ors.

18. Sadhu Saran & anr. Vs Asstt. Dir. of Consolidation, Gorakhpur & ors. (2003) 94 RD 535,

19. P.T. Munichikkanna Reddy & ors Vs Revamma & ors (2008) 26 LCD 15,

20. Saroop Singh Vs Banto & ors. (2005) 8 SCC 330

21. Vasantiben Prahladji Nayak Vs Somnath Muljibhai Nayak (2004) 3 SCC 376

22. Mohd Mohd. Ali Vs Jagadish Kalita, SCC Para 21

23. M.Siddique (D) thru Lrs. Vs Mahant Suresh Das & ors. (2019) SCC Online 140

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

1. Heard, Shri D.S. Pandey, learned counsel for the petitioner and Shri Uma Shankar Sahai, learned counsel for the respondent no.1. The respondents no.2 to 4 are the court concerned.

2. This petition has been filed against the judgment and orders dated 21.02.1975 passed by the Consolidation Officer (here-in-after referred as C.O.), 05.09.1975 passed by the Assistant Settlement Officer Consolidation (here-in-after referred as ASOC) and 20.09.1982 passed by the Deputy Director of Consolidation (here-in-after referred as DDC).

3. The dispute in the instant writ petition relates to Gata No.542 / area 0-4-16 of Khata No.47 of Village- Simra Tappa Haweli, Pargana- Bidha, Tehsil- Tanda, District- Faizabad now Ayodhya. The name of the petitioner namely Hardeo was recorded as Bhumidhar of Gata No.542 in the basic year of consolidation alongwith Rampher, Shiv Das and Sudama being the co-tenure holders. However, they have not claimed any right on the plot in question as it has been stated that the petitioner had got the land in dispute in partition. The possession of the respondent no.1 i.e. Sita Ram was recorded under clause-9 in the revenue records. On coming to know the petitioner had filed a suit for eviction but during pendency of the suit the consolidation proceedings started therefore the suit was abated. Therefore the petitioner had filed an objection under Section 9(2) of the Consolidation of Holdings Act, 1953 (here-in-after referred as Act of 1953) on 14.01.1974. The petitioner had also filed an objection regarding deficiency of some area of some other plots on 14.01.1974 but the same was not found proved by the Consolidation Authorities and before this Court also no arguments were advanced in regard to that. The respondent no.1 had filed objection to the objection / claim of the petitioner. The matter could not be settled before the Assistant Consolidation Officer therefore it was referred to the C.O. for decision on merit. The C.O., after the evidence adduced by the parties, considered the matter and rejected the objection / claim of the petitioner and directed to struck off the name of the petitioner from Gata No.542 and record the name of the respondent no.1 as Sirdar. Being aggrieved the petitioner had filed an appeal bearing no.9301 under Section 11(C) before the SOC, which was also rejected by means of the order dated 05.09.1975 by the ASOC. The Revision No.293 / 728 under Section 48 was filed by the petitioner which was also rejected by means of the judgment and order dated 20.09.1982. Hence the present writ petition has been filed. During pendency of the present writ petition the petitioner and the respondent no.1 died, therefore their legal heirs have been brought on record.

4. Submission of learned counsel for the petitioner was that the respondent no.1 had not filed any objection under Section-9(2) even then the C.O. proceeded on the assumption that the objection was filed by the respondent no.1 and the title of the case was also shown as Sita Ram Vs. Hardeo illegally and in mala fide manner. The objection of the petitioner was rejected in an arbitrary, illegal and in a mala fide manner on the basis of adverse possession of respondent no.1 without fulfilling the conditions and continuity of possession. The C.O. also failed to consider the mandatory provisions of issuance of PA-10 and it's service in case of entry of clause-9 on the basis of adverse possession. The C.O. merely on presumption, has rejected the claim of the petitioner on the ground that the name of the petitioner might have been recorded. A finding in regard to filing of the eviction suit with delay has also been recorded by the C.O. on the basis of presumption but the appellate and the revisional authorities have not recorded any finding in regard to the alleged delay in filing the suit because it was filed within time. The learned courts below have also not recorded any finding that the respondent no.1 had matured his right on the basis of adverse possession prior to filing of the suit by the petitioner.

5. On the basis of above, learned counsel for the petitioner submitted that the

learned courts below, without considering the pleadings of the parties and the evidence and merely on the basis of presumption, have rejected the claim of the petitioner in an arbitrary and illegal manner. Hence the impugned orders are not sustainable in the eyes of law and liable to be quashed.

6. Learned counsel for the petitioner has relied on judgment and order dated 27.09.2013 in ***Writ-B No.43960 of 2013; Babu Lal Vs. Deputy Director of Consolidation/A.D.M. & Others,*** judgment and order dated 18.05.2015 in ***Writ-B No. 13437 of 2015; Balchan and 2 Others Vs. Deputy Director of Consolidation and Others, Dagadabai (Dead) by L.Rs. Vs. Abbas @ Gulab Rustam Pinjari; 2017 (136) RD 552 / 2017 (13) SCC 705, Ram Janam (Dead) Vs. Deputy Director of Consolidation, Gazipur and Others; 2003 (Suppl) RD 571, Ran Singh Vs. Deputy Director (C) and Others; MANU/UP/0893/2005 / 2005 (99) RD 324, Shri Uttam Chand (D) Through L.Rs. Vs. Nathu Ram (D) Through L.Rs.; AIR Online 2020 SC 35, Karnataka Board of Wakf Vs. Government of India and Others; (2004) 10 SCC 779; Manu/SC/0377/04, Putti & Others. Vs. Assistant Director, Consolidation, Bahraich & Others; 2007 (2) ALJ 143, Shri Nath Vs. The Deputy Director of Consolidation, Ghazipur and Another; 1982 SCC OnLine All 980, Sheo Mangal Lal Vs. Deputy Director of Consolidation and Others; 1978 SCC OnLine All 655, Chandi Prasad (Dead) Through L.Rs. Vs. Deputy Director of Consolidation, Kanpur and Others; 2011 (114) RD 663, Virendra Nath Through P.A. Holder R.R. Gupta Vs. Mohd. Jamil and Others; MANU/SC/0537/2004 / AIR 2004 SC 3856 and Prem Narain and Another Vs. Shiv Pati and Others; 2004 (22) LCD 1638.***

7. Per contra, learned counsel for the respondent no.1 submitted that the respondent no.1 had got the land in dispute from his father and an alternative plea of adverse possession was taken by him. The respondent no.1 had filed objection against the objection / claim of the petitioner. The name of the respondent no.1 was recorded in 1367 Fasli and PA-10 was also issued but only the number of PA-10 has not been mentioned in the record of 12 years. At the relevant point of time the period was six years for claim of adverse possession. The suit for eviction was filed by the petitioner on 15.11.1971 with delay as the petitioner had knowledge in the year 1966, which is apparent from the certified copy filed by him alongwith rejoinder affidavit. The petitioner Hardeo, who had filed the objection, never appeared in the witness box although he admitted the possession of the respondent no.1 in his objection. The respondent no.1 had specifically stated in his evidence that he is cultivating the land in dispute for the last 25 years before his father was cultivating. The plea of 'Batai' was not stated by the son of the petitioner in his evidence. However he has not disputed that the respondent no.1 should also have filed the objection.

8. On the basis of above, learned counsel for the respondent submitted that the learned courts below have rightly considered the pleadings and evidence of the parties and rejected the objection of the petitioner. There is no illegality or error in the impugned orders. The writ petition is misconceived and liable to be dismissed. Learned counsel for the respondent has relied on ***Chunni Vs. State of U.P. and Others; MANU/UP/2826/2015 / 2016 (130) RD 617 and Smt. Jagwanta Vs. Smt. Nirmala and Others; MANU /UP/0737/1982 / 1982 AWC 591 (ALD).***

9. In reply, learned counsel for the petitioner had submitted that the arguments of the respondent no.1 are beyond pleadings which is apparent from paragraph-12 of the counter affidavit filed before this Court in which also the respondent no.1 has stated that the possession of the respondent no.1 was adverse whereas the adverse possession has not been proved. So far as the submission regarding delay in filing the eviction suit, he submitted that as per submissions of the learned counsel for the respondent no.1 also the suit, was within time. Therefore, the submissions of learned counsel for the respondent are misconceived.

10. I have considered the submissions of learned counsel for the parties, gone through the orders and perused the record of writ petition.

11. The dispute relates to Gata No.542 of Khata No.47. In the basic year of consolidation, the name of the petitioner was recorded as Bhumidhar and the possession of the respondent no.1 was recorded in Column-9. The petitioner had filed the objection under Section-9(2). The matter could not be settled therefore the Assistant Consolidation Officer referred to the C.O. for decision on merit. It is apparent from the perusal of the order of C.O. that the suit has been decided with the title of Sita Ram Vs. Hardeo whereas the objection was filed by the petitioner therefore the title of the suit should have been Hardeo Vs. Sita Ram. Four issues were framed by the C.O. but despite the fact that the objection was filed by the petitioner, who was recorded as Bhumidhar in the basic year, the first issue was framed as to whether the petitioner is Sirdar of the land in dispute No.542 and the third issue was framed as to whether Sita Ram is Bhumidhar of land in dispute. From the finding recorded by the C.O. it is apparent that he has not found the continuous possession of the respondent no.1 and recorded a findings on the presumption that the name of the plaintiff i.e. respondent no.1 was recorded in the year 1359 Fasli as Sikmi and his name might have been left in the subsequent years and thereafter it was recorded in the year 1336-1367 Fasli. A finding has also been recorded on the basis of record that there is no reference of PA-10 but on the basis of objection of the petitioner the requirement of PA-10 is said to have been fulfilled. Though a finding has been recorded that the name of the petitioner is also recorded with the difference of 1-2 years but it has been stated to be doubtful because there is no PA-10. Therefore, it is apparent that the learned C.O. has dealt with the matter without application of mind and considering the records and the relevant law applicable because PA-10 was not required for petitioner who was recorded as Bhumidhar in the basic year. It was required for the respondent no.1, who was claiming on the basis of adverse possession. Therefore the findings recorded by the C.O. are illegal perverse.

12. The name of the respondent no.1 was recorded in clause-9 on the basis of order passed by the Supervisor Kanoongo. There is no finding that the respondent no.1 was in continuous possession for a period of 12 years though on the basis of record of 12 years filed before this Court it was argued that PA-10 is mentioned in some years but the number of PA-10 has not been mentioned and it has not been issued in accordance with law and not served on the main tenant i.e. the petitioner. Therefore the benefit of it can not be given to a person i.e. the respondent no.1 who is

claiming on the basis of adverse possession. The claim from his father has also not been proved.

13. The appellate authority also proceeded on the assumption that the respondent no.1 want to get his name recorded as Sirdar on the basis of adverse possession but without any finding as to whether the petitioner was in continuous possession and considering the order passed by the Supervisor Kanoongo and the eviction suit filed by the petitioner recorded his opinion that the respondent no.1 has proved his possession on the land in dispute from oral and documentary evidence. It has not recorded any finding that as to whether the Supervisor Kanoongo had passed the order for recording the name of the respondent no.1 after following the due procedure of law or not.

14. The revisional authority also dealt with the matter on the assumption that Sita Ram has filed the objection in regard to Gata No.542 and he has matured his right on the land on the basis of adverse possession therefore his name should be recorded as Bhumidhar. The DDC also recorded a finding that from 1359 Fasli to 1370 Fasli there is no entry of possession in favour of the revisionists and the entry of possession of 1371 Fasli is not in accordance with the Land Records Manual whereas the C.O. has accepted that the name of the petitioner is also recorded by the difference of 1-2 years. However, the revisional authority has nowhere stated that as to whose name is recorded as main tenure holder. In regard to PA-10, without any evidence, it has been recorded that the order has been passed after inquiry of PA-10. Accordingly the revisional authority held that he feels that the courts below have given the correct decision by declaring Sita Ram as Sirdar of land in dispute on the basis of possession. Therefore it is apparent that the respondent no.1 has been declared to have matured his right on the basis of adverse possession while he was not in continuous possession and the procedure for recording under clause-9 on the basis of adverse possession by issuance of PA-10 was not followed, the service of which, on main tenant, was also mandatory. But there is no proof of service. The courts below have rejected the claim of the petitioner while he was recorded as Bhumidhar in Khatauni of basic year. The right on the basis of adverse possession will accrue in accordance with law and not merely because the petitioner had stated in his objection that the respondent was given the land in dispute for plowing and therefore he was in possession but he had got his name wrongly recorded in clause-9 without due procedure of law.

15. The para-89-A, 89-B and 102-B of the Land Records Manual (here-in-after referred as 'the manual'), relevant for the purpose, are extracted below:-

***"89-A. List of changes**.-After each Kharif and rabi portal of a village the Lekhpal shall prepare in triplicate a consolidated list of new and modified entries in the Khasra in the following form:*

Form No.P-10

Khasra No. of Plo	*Area*	*Details of entry in the last year*	*Details of entry made in the current year*	*Verification report by the Reven*	*Ramarks*

t				*ue Ins pec tor*	
1	*2*	*3*	*4*	*5*	*6*

(ii) The Lekhpal shall fill in the first four Columns and hand over a copy of the list to the Chairman of the Land Management Committee. He shall also prepare extract from the list and issue to the person or persons concerned recorded in Columns 3 and 4 to their heirs, if the person or persons concerned have died, obtaining their signature in the copy of the list retained by him. Another copy shall be sent to the Revenue Inspector.

(iii) The Revenue Inspector shall ensure at the time of his partial of the village the extract have been issued in all the cases and signatures obtained of the recipients.

***89-B. Report of changes**.- The copy of the list with the Lekhpal containing the signatures of the recipients of the extracts shall be attached to the Khasra concerned and filed with the Registrar (Revenue Inspector) alongwith it on or before 31st July, of the following year (sub-paragraph (iv) of the paragraph 60).*

***102-B. Entry of possession (Column 22) (Remarks column).**- (1) The Lekhpal shall while recording the fact of possession in the remarks Column of the Khasra, write on the same day the fact of possession with the name of the person in possession in his diary also, and the date and the serial number of the dairy in the remarks Column of the Khasra against the entry concerned.*

(2) As the list of changes in Form p-10 is prepared after the completion of the patal of village, the serial number of the list of changes shall be noted in red ink below the entry concerned in the remarks column of the Khasra in order to ensure that all such entries have been brought on the list.

(3) If the Lekhpal fails to comply with any of the provisions contained in paragraph 89-A, the entry in the remarks Column of the Khasra will not be deemed to have been made in the discharge of his official duty."

16. Reading of the aforesaid provisions makes it clear that if any entry is made in PA-10, the same shall be communicated to the person or persons concerned recorded in columns 3 and 4 or their heirs and obtain their signatures. Records on being submitted to the Revenue Inspector, he shall ensure at the time of Padtal i.e. verification of the village that it has been issued in all the cases and the signatures obtained by the recipients. Therefore, in case,any entry made on the basis of adverse possession the same was to be communicated to the person concerned and the person claiming is required to prove that it was in accordance with the manual and as to what was nature of possession and when it started in the knowledge of the tenant and the possession was continuous and how long it continued.

17. This Court considered this issue in the case of ***Mohd. Raza Vs. Deputy Director of Consolidation and Another; R.D. 1997 (R.D.) 276*** and held that the entries in the revenue papers not prepared by following the procedure prescribed under the Uttar Pradesh Land Records Manual and PA-10 notice was not served on the main tenant, such entries are of no evidentiary value and would not confer any right.

18. This court, in the case of ***Gurumukh Singh and Others Vs. Deputy Director of Consolidation, Nainital and Others; 1997 (80) RD 276***, has also held that the entries will have no evidentiary value if they are not in accordance with the

provisions of Land Records Manual and the burden to prove is on the person who is asserting the possession on the basis of adverse possession. Relevant paragraphs 6 and 7 are extracted below:-

*"**6**. It is clear from Para A-102C of the Land Records Manual that the entries will have no evidentiary value if they are not made in accordance with the provisions of Land Records Manual. There is presumption of correctness of the entries provided it is made in accordance with the relevant provision of Land Records Manual and secondly, in case where a person is claiming adverse possession against the recorded tenure-holder and he denies that he had not received any P.A. 10 or he had no knowledge of the entries made in the revenue records, the burden of proof is further upon the person claiming adverse possession to prove that the tenure-holder was duly given notice in prescribed Form P.A. 10. Para A-81 itself provides that the notice will be given by the Lekhpal and he will obtain the signature of the Chairman, Land Management Committee as well as from the recorded tenure-holder. It is also otherwise necessary to be provided by the person claiming adverse possession. The law of adverse possession contemplates that there is not only continuity of possession as against the true owner but also that such person had full knowledge that the person in possession was claiming a title and possession hostile to the true owner. If a person comes in possession of the land of another person, he cannot establish his title by adverse possession unless it is further proved by him that the tenure-holder had knowledge of such adverse possession.*

*7. In **Jamuna Prasad v. Deputy Director of Consolidation, Agra and Others**, this Court repelled the contention that the burden of proof was upon the person who challenges the correctness of the entries. It was observed:*

"Learned counsel for the Petitioner argued that there was a presumption of correctness about the entries in the revenue records and the onus lay upon the Respondent to prove that the entries showing the Petitioner's possession had not been in accordance with law. This contention is untenable Firstly, it is not possible for a party to prove a negative fact. Secondly, the question as to whether the notice in Form P.A. 10 was issued and served upon the Petitioner also is a fact which was within his exclusive knowledge."

"Petitioner's contention that the burden lay on the Respondents to disprove the authenticity and destroy the probative value of the entry of possession cannot be accepted. In my opinion, where possession is asserted by a party who relies mainly on the entry of adverse possession in his favour and such possession is denied by the recorded tenure-holder, the burden is on the former to establish that the entries in regard to his possession was made in accordance with law."

19. This Court, in the case of ***Sadhu Saran and Another Vs. Assistant Director of Consolidation, Gorakhpur and Others; 2003 (94) RD 535***, has held that it is well settled in law that the illegal entry does not confer title.

20. This Court, in the cases of ***Babu Lal Vs. Deputy Director of Consolidation (Supra), Balchan and two Others Vs. Deputy Director of Consolidation and Others (Supra), Chandi Prasad (Dead) Through L.Rs. Vs. Deputy Director of Consolidation and Others (Supra), Shiv Mangal Lal Vs. Deputy Director of Consolidation and Other (Supra) and Shri***

Nath Vs. Deputy Director of Consolidation (Supra), has consistently held that if an entry has been made in column-9 of the Khatauni without issuing and service of PA-10 on the recorded tenure holder then such an entry was illegal and has no evidentiary value. It has further been held that the burden to prove that PA-10 was issued and served on the tenure holder is lying upon the person relying on the column-9.

21. In the present case the respondent no.1 had not even filed any objection claiming his adverse possession and it has not been proved by him that PA-10 was issued in accordance with the provisions of the Land Records Manual and served on the tenure holder whereas he has claimed on the basis of adverse possession and PA-10. On the other hand, the respondent no.1 has specifically denied in his evidence that the land in dispute has any concern with the petitioner therefore the claim of the respondent no.1 is not sustainable at all against the petitioner, who was recorded as Bhumdhar. The right of adverse possession is not a substantive right but result of the waiving it willfully or omission by negligence or otherwise of a right to defend or care for the integrity of the property on the part of the paper owner of the land.

22. This Court in the case of ***Putti and Others Vs. Assistant Director of Consolidation, Bahraich and Others (Supra)*** has held that the court should be slow to declare the right on the basis adverse possession otherwise it may become a weapon in the hands of mighty persons to acquire the property of the weaker sections of society. It has further held that there shall not be presumption of continuous possession to declare right and title on the basis of adverse possession unless year to year entries made in accordance with law in the Khasra or Khatauni and proved by cogent and trustworthy evidence, the burden to prove which is on the person who claims Sirdari or Bhumidhari rights on the basis of adverse possession. Relevant paragraph-41 is extracted below:-

*"**41.** Right to claim title on the basis of adverse possession is a legacy of British law. Courts should be slow to declare right on the basis of adverse possession. In case liberal approach is adopted to extend right and title on the basis of adverse possession then it may become a weapon in the hands of mighty persons to acquire the property of the weaker sections of the society. Accordingly, it shall always be incumbent upon the Courts to do close scrutiny of the evidence and material on record within the four corners of law as settled by Apex Court, discussed herein above. Even little reasonable doubt on the evidence relied upon by a party to claim right and title on the basis of adverse possession may be sufficient to reject such claim under a particular fact and circumstance.*

There shall not be presumption on continuous possession to declare right and title on the basis of adverse possession unless year to year entries made in accordance to law in the Khasra or Khatauni are proved by cogent and trust worthy evidence. burden of proof of such entries shall lie, as discussed herein above, on the person who claims Sirdari or bhumidhari right on the basis of adverse possession. In the absence of any such proof, presumption shall be in favour of recorded tenure-holder whose name has been recorded in column-1 of the Khatauni."

23. Similar view has been taken in the case of ***Prem Narain and Another Vs. Shiv Pati and Others (Supra), Ran Singh Vs. Deputy Director (C) and Others; (Supra) and Ram Janam Vs. Deputy Director of***

Consolidation, Gazipur and Others; (Supra).

24. The Hon'ble Apex Court, in the case of ***P.T. Munichikkanna Reddy and Others Vs. Revamma and Others; 2008 (26) LCD 15***, has held that in case of adverse possession, communication to the owner and his hostility towards the possession is must. The relevant paragraphs 19 to 23 are extracted below:-

*"**19.** Thus, there must be intention to dispossess. And it needs to be open and hostile enough to bring the same to the knowledge and plaintiff has an opportunity to object. After all adverse possession right is not a substantive right but a result of the waiving (willful) or omission (negligent or otherwise) of right to defend or care for the integrity of property on the part of the paper owner of the land. Adverse possession statutes, like other statutes of limitation, rest on a public policy that do not promote litigation and aims at the repose of conditions that the parties have suffered to remain unquestioned long enough to indicate their acquiescence.*

***20.** While dealing with the aspect of intention in the Adverse possession law, it is important to understand its nuances from varied angles.*

***21**. Intention implies knowledge on the part of adverse possessor. The case of **Saroop Singh v. Banto and Others; (2005) 8 SCC 330** in that context held:*

*"**29**. In terms of Article 65 the starting point of limitation does not commence from the date when the right of ownership arises to the plaintiff but commences from the date the defendants possession becomes adverse. (See **Vasantiben Prahladji Nayak v. Somnath Muljibhai Nayak, (2004) 3 SCC 376**).*

***30.** Animus possidendi is one of the ingredients of adverse possession. Unless the person possessing the land has a requisite animus the period for prescription does not commence. As in the instant case, the appellant categorically states that his possession is not adverse as that of true owner, the logical corollary is that he did not have the requisite animus. (See **Mohd Mohd. Ali v. Jagadish Kalita, SCC para 21)**"*

*22. A peaceful, open and continuous possession as engraved in the maxim nec vi, nec clam, nec precario has been noticed by this Court in **Karnataka Board of Wakf v. Government of India and Other; (2004) 10 SCC 779** in the following terms:*

"Physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are the most important factors that are to be accounted in cases of this nature. Plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show: (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession"

***23.** It is important to appreciate the question of intention as it would have appeared to the paper-owner. The issue is that intention of the adverse user gets communicated to the paper owner of the property. This is where the law gives importance to hostility and openness as*

pertinent qualities of manner of possession. It follows that the possession of the adverse possessor must be hostile enough to give rise to a reasonable notice and opportunity to the paper owner."

25. Similar view has been taken by the Hon'ble Apex Court in the case of ***Karnataka Board of Waqf and Others Vs. Government of India and Others (Supra)*** and ***Virendra Nath Through P.A. Holder R.R. Gupta Vs. Mohd. Jamil and Others (Supra).***

26. The Hon'ble Apex Court in the case of ***Shri Uttam Chand (D) Through L.Rs. Vs. Nathu Ram (D) Through L.Rs. (Supra)*** has held that Adverse possession is hostile possession by assertion of a hostile title in denial of the title of the true owner and mere possession for some years was not sufficient to claim adverse possession. A Constitution Bench in the case of ***M. Siddique (D) through Lrs. Vs. Mahant Suresh Das and Others; (2019) SCC Online 140*** has held that a plea of adverse possession is founded on the acceptance that ownership of the property vests in another against whom the claimant asserts a possession adverse to the title of the other. Similarly in the case of ***Dagadabai (Dead) by L.Rs. Vs. Abbas @ Gulab Rustam Pinjari (Supra)*** the Hon'ble Apex Court has held that it is settled principal of law of adverse possession that the person who claims title over the property on the strength of adverse possession and thereby wants to diverse the true owner of his ownership rights over such property is required to prove his case only against the true owner of the property. It is equally well settled that such person shall necessarily first admit the ownership over the property to the knowledge of the true owner and secondly the true owner has to be made a party to the suit to enable the court to decide the plea of adverse possession between the two rival claimants. In the present case the respondent no.1 neither filed any objection against the records published during consolidation proceedings claiming the right of adverse possession nor accepted the ownership of the petitioner therefore he is not entitled to be recorded on the basis of adverse possession.

27. The petitioner is not entitled for any benefit of the judgment relied by him in the case of ***Chunni Vs. State of U.P. and Others (Supra)*** because in the said case it has been observed that the issuance of PA-10 was compulsory between 1959-65. In the instant case the name has been recorded on the basis of the order passed by the Supervisor Kanoongo on 15.03.1961, which could have been passed after issuance of PA-10 and service of the same on the original tenant therefore in view of the aforesaid judgment the procedure for issuance of PA-10 was mandatory at the relevant point of time but none of the courts below have recorded a single finding that the PA-10 was issued in accordance with the procedure prescribed under the Land Records Manual. In fact it has been proved by the finding of the C.O. that the PA-10 was not issued and that procedure was not followed as it has recorded that the requirement of PA-10 has been fulfilled by the objection of the petitioner.

28. Adverting to the question of filing of the suit under Section *209/229 of the U.P. Zamindari Abolition and Land Reforms Act, 1950* admittedly it was filed on 15.11.1971 i.e. 1378 Fasli. The C.O. on the basis of evidence of the son of the petitioner that the objection was made prior to one year of consolidation proceedings recorded a finding that it must have been after 1378 Fasli and if

it is presumed that the possession of the respondent no.1 was recorded in the year 1972 Fasli then also the six years had not completed therefore this finding was purely on presumption and on the basis of this finding the rights under Section 210 of the Act of 1950 could not have been perfected. Even if the submission of learned counsel for the respondent no.1 is accepted that the petitioner had knowledge of the entry made in the year 1966 i.e 1373 Fasli then also it was within six year as the suit was filed in 1378 Fasli.

29. This Court in the case of ***Smt. Jagwanta Vs. Smt. Nirmala and Others (Supra)*** in paragraph-2 has noted that the period of limitation prescribed for a suit, for ejectment of a trespasser under Section 209 of the Act of 1950 was six years during the period between 27.03.1969 and 13.10.1971 and this was increased to 12 years by notification dated 14.10.1971 amending the relevant entry no.30 of appendix-3 to the rules and the serial no.24 of Schedule-2 of the act. Therefore on the date of filing of the suit by the petitioner on 15.11.1971 the limitation for filing the suit was 12 years so it was within limitation. The appellate authority and the revisional authority have not recorded any finding that the suit was time barred. Therefore also the respondent no.1 is not entitled for benefit of Section 210 of the Act of 1950.

30. The courts below have also not recorded the concurrent finding because they have recorded the finding on presumption and the appellate authority and the revisional authority have virtually affirmed the findings of courts below as discussed above. The courts below have dealt with the matter on the wrong assumption that the respondent no.1 was claiming his title on the basis of adverse possession but failed to consider that the respondent no.1 had neither filed any objection nor proved his claim on the basis of adverse possession. The courts below also failed to consider that the name of the petitioner was recorded as Bhumidhar in the basic year entry therefore the objection was required to be filed by the respondent no.1 asserting the claims against the true owner which he failed to do. Therefore this Court is of the considered opinion that the impugned judgment and orders dated 21.02.1975, 05.09.1975 and 20.09.1982 are perverse and have been passed in an arbitrary and illegal manner, recording perverse findings without application of mind and considering the over all facts and circumstances of the case and in the light of the law applicable. Therefore they are not sustainable at all in the eyes of law and liable to be quashed and the name of the petitioner is liable to be allowed to be continued in the revenue records as Bhumidhar as was recorded in the basic year and the possession of the respondent no.1 is liable to be expunged.

31. The writ petition is, accordingly, ***allowed.*** The impugned orders dated 21.02.1975, 05.09.1975 and 20.09.1982 are hereby quashed. The name of the petitioner shall continue in the revenue records as was recorded in the basic year and the possession of the respondent shall be expunged. No order as to costs.

(2021)06ILR A249
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 21.06.2021

BEFORE

THE HON'BLE RAJNISH KUMAR, J.

Consolidation No. 2839 of 1980

Ram Sunder & Anr. ...Petitioners
Versus
Joint Director of Consolidation, Sultanpur & Ors. ...Respondents

Counsel for the Petitioners:
H.S. Sahai, Madhav Srivastava, R.D. Yadav, Uma Shankar Sahai

Counsel for the Respondents:
D.P. Dwivedi, C.S.C., Ram Dhiraj Yadav

Civil Law - U.P. Consolidation of Holdings Act, 1953-Section 9-A(2)-challenge to-whether a widow, who got the land from her husband which was coming from his ancestors can transfer it to anybody or not-the land in dispute had come to Smt. Maina as widow of Shital, her husband-therefore, after her death property would revert back to the family of her husband and devolve upon the nearest surviving heirs according to section 171 of the Act 1950-heirs of the last male-holder and not that of the deceased female bhumidhar who succeed to the holding-her interest in the holding ends with her death-(Para 1 to 29)

A bhumidhar with transferable rights can transfer his or her interest in the land subject to the conditions in the Act, 1950, but it can be only in accordance with law i.e. the Transfer of Property Act and Indian Registration Act. no other mode of transfer has been provided in the Act, 1950. Section 166 of the Act 1950 provides that any transfer made in contravention of the provisions of this Act, shall be void.(Para 25 to 29)

The peition is partly allowed. (E-5)

List of Cases cited:-

1. Jagdamba Singh & ors. Vs DDC & ors. (1985) RD 281

2. Ramji Dixit & anr. Vs Bhrigunath & ors. (1965) AIR Allahabad 1(V 52 C 1),

3. Devinder Singh & ors. Vs St. of U.P. & ors. (2009) 1 ADJ 640

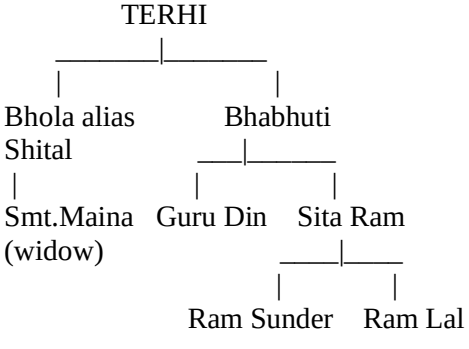
4. Umesh Chand & ors Vs Board of Revenue, Allahabad & ors. (2002) 2 AWC 932

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

1. Heard, Shri U.S.Sahai, learned counsel for the petitioners and Shri Ram Dhiraj Yadav, learned counsel for the respondents no.3/1 and 3/2. Learned Standing Counsel is present for the respondents no.1 and 2.

2. The instant writ petition has been filed challenging the order dated 26.06.1975 and order dated 24.05.1980 passed by the opposite parties no.1 and 2 respectively.

3. The dispute relates to Khata No.35 recorded in the name of opposite party no.3-Ram Niwas in the basic year as 'bhumidhar'. On publication of records, the petitioners had filed objection under Section 9-A(2) of the U.P. Consolidation of Holdings Act, 1953 (hereinafter referred as the Act of 1953) alleging that the name of opposite party no.3 was recorded incorrectly, whereas he had no right or title over the land in dispute so his name should be expunged and the Khata should be recorded in the name of the petitioners. The petitioners had stated in their objection that Bhola @ Sheetal was son of Terhi and they relied on the following pedigree:-



4. The petitioners claim that the land in dispute was acquired by Terhi and on his death his two sons Bhola @ Shital and Bhabhuti became the heirs. Since Bhola @ Shital was elder, so his name was recorded. Bhola @ Shital died just before third settlement and on his death the land came to be recorded in the name of his widow Smt.Maina. Accordingly Smt. Maina and Bhabhuti came into joint possession. When Smt. Maina died Bhabhuti was alive, who was real brother of Bhola @ Shital so the land, which was recorded by succession in the name of Smt.Maina from her husband, reverted to the family of her husband and Bhabhuti, brother of her husband, being the sole heir, was entitled for entire land and on his death his two sons Guru Din and Sita Ram came in possession. On the death of Sita Ram his two sons Ram Sunder and Ram Lal came in possession alongwith Guru Din. It was further contended that Smt. Maina died after the date of vesting and the opposite party no.3 got his name entered in the Khatauni by the Lekhpal without any right or title, therefore the said entry was illegal and without jurisdiction.

5. The aforesaid claim of the petitioners was refuted by the opposite party no.3. He asserted that Bhola and Shital were two different persons. He claimed himself to be the son of daughter of Smt. Maina, wife of Shital. According to him Shital and Maula are two different persons and sons of Bhawani Bhikh. He relied on the following pedigree:-

Ganga
|
Bhawani Bheekh
|
Sheetal — Maula
|
Musammat Maina
|
Sahdei
|
Ram Newaj

6. It appears that the dispute could not be reconciled before the Assistant Consolidation Officer therefore the case was forwarded to the Consolidation Officer for disposal. The parties tendered their oral and documentary evidence before the Consolidation Officer. On behalf of the petitioners khatauni extracts of 2nd settlement, 3rd settlement and khasra extracts of third settlement and khataui extracts of 1371, 1360 fasli and 24 rent receipts and khatauni extracts of 1362 fasli were filed. Petitioners examined Ram Sunder. On behalf of opposite party no.3 sanad bhumidhari dated 18.04.1951, khatauni extracts of 1363 fasli, khasra extract of 1363 fasli were filed. Ram Niwas, opposite party no.3 had not entered into witness box and on his behalf Mukhtar-e-Aam Ram Dularey was examined and rent receipts were also filed.

7. The Consolidation Officer, after considering the evidence on record, allowed the objection filed by the petitioners and directed to record the name of the petitioners after expunging the name of opposite party no.3 by the order dated 27.12.1974. The opposite party no.3 preferred an appeal before the Settlement Officer Consolidation, which came up for hearing before the Assistant Settlement Officer Consolidation, who allowed the appeal by the order dated 26.06.1975. Being aggrieved, the petitioners preferred the revision, which came up for hearing before the Joint Director of Consolidation, who dismissed the revision by the order

dated 24.05.1980. Hence the present writ petition has been filed.

8. During pendency of the writ petition the petitioners no.2, 3 and opposite party no.3 died, therefore, their legal heirs have been brought on record.

9. Submission of learned counsel for the petitioners was that the land in dispute was coming from Terhi and after death of Bhola @ Shital name of his widow Smt. Maina was recorded. She died issueless. Therefore, as per law, the land in dispute reverted to the family of her husband and came to Bhabhuti, who was brother of her husband. Thereafter to his successors. But the opposite party no.3 had got his name recorded illegally. He further submitted that there was no evidence that opposite party no.3 was son of the daughter of Smt. Maina. Since neither the opposite party no.3 nor his mother came in the witness box, therefore evidence of power of attorney holder could not have been relied. In any case the entry in the Khatauni extract of the 1362 fasali was not in accordance with law inasmuch as no case number and signature was found. He had further submitted that the mother of the opposite party no.3 i.e. Sahdei was not the daughter of Smt. Maina and also asserted that Smt. Maina had died issueless in 1953. Therefore she could not have put the thumb impression while the name of opposite party no.3 was recorded allegedly on her consent but her thumb impression was not by way of consent, whereas the same could also not have been recorded in the alleged manner in accordance with law. He also submitted that even if Sahdei was the daughter of Smt.Maina and opposite party no.3 was the son of Sahdei, the name of opposite party no.3 could not have been recorded during life time of Smt. Maina and Sahdei because no Bhumidhar or Sirdar can get the name of a person recorded in his life time in the khatauni and as per the law applicable at the relevant point of time the land in dispute could not have been devolved on her and it should have been reverted to the family of his husband. The name can be recorded only on the basis of succession or transfer of property in accordance with law and on the basis of the order passed by the competent authority, but the opposite parties no.1 and 2 have failed to consider it. He further submitted that the opposite parties no.1 and 2 have committed manifest error of law in not considering the question of succession in accordance with Section 171 and 172 of U.P.Zamindari Abolition and Land Reforms Act 1950 (hereinafter referred as the Act of 1950) and considered under Section 174.

10. He further submitted that opposite party no.3 had raised a fresh plea of different pedigree at the appellate stage. As such the stand as taken before the Consolidation Officer was changed before the Settlement Officer Consolidation and Deputy Director of Consolidation. He also submitted that opposite party no.3 was habitual of committing fraud because he had got his name removed from one of the plots, the evidence in regard to which has been filed by the petitioners alongwith rejoinder affidavit. The opposite parties no.1 and 2 have passed the order without considering the law applicable on the facts and circumstances of the case, therefore, the impugned orders are not sustainable in the eyes of law.

11. Learned counsel for the respondents vehemently opposed the submissions of learned counsel for the petitioners. He had submitted that the basic

year entry was in the name of opposite party no.3 and in fact in the verification i.e. partal the petitioners were not found in possession. The petitioners have claimed the land in dispute by alleging Bhola @ Shital as their ancestor without any basis and evidence and the Consolidation Officer had considered the same without considering the evidence and law applicable. He had further submitted that in the present case provisions of Section 171 and 172 of the Act of 1950 are not applicable and the provisions of Section 174 are applicable. The name of opposite party no.3 was got recorded by Smt. Maina by her consent in presence of the villagers and the authorities and he had also put her thumb impression which was recorded in pursuance of the order passed by the Tehsildar, but the same was not challenged knowing fully well. Petitioners have tried to create a doubt alleging that Smt. Maina had died in 1953 without any basis or evidence, whereas she was alive at that time. Lastly he submitted that merely because the opposite party no.3 had got his name struck off from any record, as it was wrongly recorded, cannot be a ground of alleging that opposite party no.3 is habitual of making fraud, rather it shows his bonafide. In fact the fraud had been committed by the petitioners by adding @ Shital alongwith Bhola. He had also submitted that opposite party no.3 had given Power of Attorney because he was hard of hearing & blind and there was no illegality or infirmity in the evidence adduced by the Power of Attorney holder.

12. On the basis of above learned counsel for the opposite party no.3/1 and 3/2 submitted that the orders passed by opposite party no.1 and 2 are in accordance with law and the writ petition has been filed on misconceived and baseless grounds, which is liable to be dismissed with costs.

13. I have considered the submissions of learned counsel for the parties and perused the record.

14. The dispute relates to Khata No.35 recorded in the name of opposite party no.3 in the basic year as bhumidhar. The claim of the petitioners under Section 9-A(2) of the Act of 1950 has been set up on the ground that after death of Smt.Maina widow of Bhola @ Shital the property was reverted back to the family of her husband and accordingly devolved on them being the descendants of Bhabhuti brother of Bhola @ Shital because the property was acquired by their father Terhi. It is not in dispute that the family of the petitioners and the opposite party no.3 are different. Both the parties does not dispute that Smt. Maina was wife of Shital and the land in dispute had come to her from her husband. A claim has also been set up by the opposite party no.3 on the ground that it was self acquired by Smt. Maina. But it could not be proved. The allegation of the petitioners is also that Smt. Maina had died issueless, whereas the claim of opposite party no.3 is that Sahdei was her daughter and during life time Smt. Maina had got the name of the opposite party no.3, who is son of the daughter of Smt. Maina, recorded in the revenue records. This proceeding has been alleged to have been held in presence of the villagers and in pursuance of an order passed by the Tehsildar, the name of opposite party no.3 was recorded.

15. In regard to the claim that Bhola @ Shital was one and the same person the petitioners had filed the copy of Intkhab register of the year 1934 in which it has been shown that Shital @ Bhola had died

on 19.02.1934 and the information of death was given by Terhi. The opposite parties had got summoned Shyam Singh, Incharge Mohafizkhana (Record Room) Sultanpur with original register of death. The witness on the basis of the register stated that only 1089 applications for copies were filed in the year 1974 while the application number of the copy filed by the petitioners is 1234. He also stated that no application for said certified copy was filed on the date i.e. 12.04.1974. Accordingly it was proved that a forged and false copy was produced in the court, which could not prove that Shital @ Bhola are one and the same person. In support of the claim of the petitioners no other evidence was adduced to prove that Bhola @ Shital are one and the same person. Therefore it is apparent that the petitioners by adding @ Shital with Bhola tried to include Shital in his family to get the land in dispute. The Settlement Officer Consolidation and Joint Director of Consolidation have rightly considered and recorded the finding in regard to it.

16. The learned Consolidation Officer, without recording any finding as to how Bhola @ Shital is one and the same person, had allowed the objection. It appears that the Consolidation Officer was impressed by the submissions of the petitioners that Shital, who was eldest son of Terhi, was of a very simple nature, therefore, the villagers had named him Bhola but mere submission without evidence cannot be a ground to accept that Bhola @ Shital is one and the same person. It has also not come anywhere that Smt. Maina was recorded as widow of Bhola @ Shital and she has been recorded everywhere as Smt. Maina widow of Shital. Therefore, the claim set up by the petitioners has not been proved by any cogent evidence, rather the claim has been tried to be set up on the basis of a forged and fabricated document. Therefore the claim of the petitioners is not sustainable in the eyes of law. It is also settled law that a party playing fraud with the court is not entitled for any relief. The Hon'ble Supreme Court, in the case of **S.P. Chengalvaraya Naidu (Dead) By LRs Versus Joganath (Dead) by LRs and others; (1994) 1 SCC 1** about fraud and the effect of decree obtained by fraud, has held as under in paragraph 1:-

"1. Fraud avoids all judicial acts, ecclesiastical or temporal" observed Chief Justice Edward Coke of England about three centuries ago. It is the settled proposition of law that a judgment or decree obtained by playing fraud on the court is a nullity and non est in the eyes of law. Such a judgment/decree by the first court or by the highest court has to be treated as a nullity by every court, whether superior or inferior. It can be challenged in any court even in collateral proceedings."

17. It appears from the orders and record filed before this court that the disputed plot nos.401, 402, 403 and 414 of land in dispute were recorded in the name of Bhawani Bhikh in the first settlement. Thereafter it was recorded in the name of Maula son of ..... Caste Aheer in the second settlement and plot nos.324 and 325 were recorded in the name of Bhola son of Terhi. Therefore Bhola and Maula were two separate persons. Both the parties had also admitted that their families are different and have no concern with each other. It also appears that land was not coming down in the identical form. This court, in the case of **Jagdamba Singh and others versus Dy.Director of Consolidation and others; 1985 RD 281**, has held that in order to uphold the claim of

co-tenancy rights on the ground that the holding in dispute is an ancestral property, it is necessary that the holding should have come down intact in the identical form without any break and it would not be open to pick up few plots of the holding which initially belonged to common ancestor and declare them to be ancestral property giving a share to the claimant on that ground.

18. It is not in dispute that the land in dispute had come to Smt. Maina as widow from her husband Shital after his death. Therefore, the first question for consideration is as to whether a widow, who got the land from her husband which was coming from his ancestors can transfer it to anybody or not. Section 171 and 172 of the Act of 1950 provides the general order of succession. Since a bhumidhar with transferable rights can transfer his agricultural land subject to the restrictions contained in Chapter VIII of the Act of 1950, therefore, a widow, acquiring the bhumidhari rights from her husband, can also transfer the land during her life time in accordance with law. A Full Bench of this court, in the case of **Ramji Dixit and another Versus Bhrigunath and others; AIR 1965 Allahabad 1 (V 52 C 1),** has held that a female, who inherits the bhumidhari rights from the family of her husband, can transfer such holdings, which shall be valid and effective even beyond her life time. In view of above Smt.Maina could have transfered the land in dispute but in accordance with law.

19. However the question arises as to whether Smt. Maina could have got the land in dispute recorded with her consent in the name of opposite party no.3, who is alleged to be the son of her daughter without transferring in accordance with law because the alleged transfer was neither by any mode of transfer nor succession. It has also been alleged that the thumb impression of Smt. Maina in the remark column is not way of consent and the order of Tehsildar is also not signed and there is no case number and parties name. Section 152 of the Act of 1950 provides that the interest of a bhumidhar with transferable rights shall, subject to the conditions hereinafter contained, be transferable. Therefore a bhumidhar with transferable rights can transfer his/her interest in the land subject to conditions in the Act of 1950, but it can be only in accordance with law i.e. the Transfer of Property Act and the Indian Registration Act. No other mode of transfer has been provided in the Act of 1950. Section 166 of the Act of 1950 provides that any transfer made in contravention of the provisions of this Act, shall be void. In the present case the alleged transfer has not been made in accordance with any of the mode or procedure prescribed under law because it is no where provided that a person can get the name of anybody recorded without executing any deed of transfer. Therefore the alleged transfer made by Smt. Maina during her life time to the opposite party no.3 is alien to law, as such not sustainable in the eyes of law. Any transfer of property can not be made which is not covered by any statute or law.

20. This court, in the case of **Devinder Singh and others Versus State of U.P. and Others; 2009 (1) ADJ 640,** has held that agricultural land cannot be transferred through mutation application and partition can take place among co-tenure holders and not between the tenure holders and stranger. The agricultural land in U.P. is governed by U.P.Z.A. and L.R.Act. The relevant paragraph 6 is extracted below:-

"6. The A.D.M. was right in holding that agricultural land cannot be transferred through mutation application. Partition among co-tenure holders may be effected only through the suit under Section 176 of U.P.Z.A. and L.R. Act filed before S.D.O. Moreover, partition can take place amongst co-tenure holders and not between tenure-holder and stranger. Concept of the Joint Hindu Family property where sons may have right by birth in the ancestral property, which is in the hands of their father, is not applicable to agricultural land in U.P. which is governed by U.P.Z.A. and L.R. Act. As far as Ceiling Act is concerned, such mutation is meaningless for the Ceiling Act and under Ceiling Act in spite of mutation, the entire land would be treated to belong to the father/tenure holder. However, the A.D.M. was not correct in holding that stamp duty was payable on the oral arrangement in between father and sons and consequent mutation order. Moreover, A.D.M. himself rightly held that the mutation order was utterly illegal and without jurisdiction and void ab initio. This finding was additional reason for not directing payment of any stamp duty."

21. This court is of the considered view that the transfer of an agricultural land cannot be made by a mode, except as provided under law, which may be by way of sale, gift etc. It is also apparent from reference made in various Sections of Act of 1950. Such as section 154 provides that no bhumidhar shall have the right to transfer by sale or gift, section 155 provides that no bhumidhar shall have the right to mortgage any land belonging to him as such where possession of the mortgaged land is transferred or is agreed to be transferred in future to the mortgagee as security for the money advanced or to be advanced. Similarly in Section 157-A and 157-AA, the transfer of the land by way of sale, gift, mortgage or lease has been referred. The alleged mode by which the name of opposite party no.3 was recorded is not provided anywhere. Therefore the transfer of an agricultural land, being an immovable property, can be made by a bhumidhar with transferable rights only in accordance with the Transfer of Property Act and Indian Registration Act and not otherwise. Learned counsel for the respondents no.3/1 and 3/2 could also not show any other mode of transfer and validity of the alleged transfer under any law. This court in the case of, **Umesh Chand and others Versus Board of Revenue, Allahabad and others; 2002(2) AWC 932**, has held as under in paragraph 15:-

"15.....No right or interest can pass in immovable property in a manner contrary to provisions of Transfer of Property Act and Indian Registration Act....."

22. In view of above, claim of the opposite party no.3 on the basis of alleged transfer by Smt. Maina during her life time, by a mode not provided under any law, is illegal and not sustainable in the eyes of law and fails.

23. Now the question arises as to whether the opposite party no.3 is entitled for inheritance of the land in dispute of Smt. Maina, being the grandson of Sheetal and Smt.Maina, who had inherited the land in dispute from her husband as widow. Section 171 of the Act of 1950 provides the general order of succession. According to sub-section (1) 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) in accordance with the principles given in sub-section (i) to (iv) of sub-Section (1). Sub-section (2) provides that the following relatives of the male bhumidhar or asami are heirs subject to the provisions of sub-section (1) and sub section (a) provides the first category i.e. widow, unmarried daughter and the male lineal descendant, therefore, after the death of a male bhumidhar the property shall devolve on his widow. Therefore, since Shital had no male lineal descendant or unmarried daughter, therefore, it was rightly devolved on Smt. Maina, widow of Shital.

24. Section 172 of the Act of 1950 provides the succession in the case of a woman holding an interest inherited as a widow, mother, daughter, etc. According to sub-section(1) (a), when a bhumidhar or asami who has after the date of vesting, inherited an interest in any holding as a widow, 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 after the death of a widow, who has inherited the land on account of death of her husband, the land shall revert back to the family of her husband and devolve upon to the nearest surviving heirs in accordance with Section 171 of the Act of 1950.

25. In the present case, admittedly the land in dispute had come to Smt. Maina as widow of Shital; her husband. Therefore, after her death the property would revert back to the family of her husband Shital 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 (Supra)**, 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.

26. The claim of the opposite party no.3 is that he is son of the daughter of Smt.Maina, therefore the question arises as to in the case of reversion of property after death of Smt. Maina it would devolve to him under Section 172 read with Section 171 or not because after reversion of holding or part of property thereof shall devolve upon the nearest surviving heir (such heir being ascertained in accordance with the provisions of Section 171) of the last male bhumidhar, therefore, after reversion to the husband of Smt. Maina it would have to be seen as to whether it can devolve on the opposite party no.3 or not. The married daughter and daughter's son have been included in Section 171. Therefore if after the death of Smt. Maina and reversion of the property to her husband's family it could have been devolved on Sahdei the daughter of Smt. Maina, as it has been said that she was alive at that time, though her name was not recorded in the revenue records, it may devolve on the legal heirs of her daughter, in which the opposite party no.3 could have got any share or as a whole then the opposite party no.3 can get the same. Otherwise daughter's some has also a right under the above provision.

27. That a dispute has been raised that Smt. Maina had no daughter and the opposite party no.3 is not the son of the daughter of Smt. Maina. The Settlement Officer

Consolidation and the Joint Director of Consolidation on the basis of family register and uncertified copy of the voter list have come to the conclusion that Sahdei was the daughter of Smt. Maina and the opposite party no.3 was the son of Sahdei. Whereas Sahdei has been shown as wife of Shree at one place and as daughter of Shree at another place. Therefore, first it is to be ascertained on the basis of cogent evidence, if any available on record, as to whether Sahdei was the daughter of Sheetal and Smt. Maina and the opposite party no.3 was the son of Sahdei and in case on the basis of some cogent evidence it is found that opposite party no.3 was the son of daughter of Smt.Maina, he may get the land in dispute as discussed above and in accordance with law failing which the interest shall stand extinguished on the death of Smt. Maina under Section 189 of the Act of 1950 and the Land Management Committee shall be entitled to take possession of the land under Section 194 of the Act of 1950 and accordingly it may be considered and the order may be passed under Section 11-C of the Act of 1953.

28. In view of above, this court is of the considered opinion that the writ petition is liable to be partly allowed and the matter is to be remanded to the Settlement Officer Consolidation to re-consider the case afresh in the light of aforesaid discussion only to the extent as to whether the opposite party no.3 was a legal heir of the male lineal descendant after reversion of the property after death of Smt. Maina and if so whether the same shall devolve on him in accordance with law or not, failing which the decision shall be taken in light of the observations made here-in-above under Section 11-C of the Act of 1953.

29. With the aforesaid the writ petition is **partly allowed**. The impugned order dated 24.05.1980 passed by the Deputy Director of Consolidation, Sultanpur in Revision No.5989/2884, under Section 48 of the Consolidation of Holdings Act is quashed and the order dated 26.06.1975 passed by the Assistant Settlement Officer Consolidation is also quashed to the extent of continuance of the entry of basic year and the order is upheld to the extent of quashing of the order passed by the Consolidation Officer. The matter is remanded to the Settlement Officer Consolidation, Sultanpur to decide a fresh in light of the observations made here-in-above.

30. The matter being old, shall be decided expeditiously say within a period of six months from the date of receipt of a certified copy of this order. Let a copy of this order be communicated to the Settlement Officer Consolidation, Sultanpur forthwith.

31. No order as to costs.

(2021)06ILR A258
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 25.06.2021

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.

Consolidation No. 22455 of 2020

Rakesh Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Ajay Pratap Singh 'Vatsa'

Counsel for the Respondents:
C.S.C., Dilip Kumar Pandey

A. Civil Law - U.P. Consolidation of Holdings Act, 1953-Section 19(1)(e)-

Allotments of chaks-petitioner was given two chaks in which one chak was at a distance of 3 km from the village-petitioner moved an objection before the Consolidation officer-prayed that chak should be carved over Bachat land belonging to Gaon Sabha as Gaon Sabha has no objection inorder to facilitate cultivation. (Para 1 to 33)

B. the principles laid down in Section 19 are guiding factors hedged by the phrase:-" as far as possible"k only to better facilitate consolidation and allotment of compact areas to facilitate better utilization of land and other resources. section 19 only provides relates to allotment to a tenureholder of chak upon the land to which he has already made some improvements, requires authorities to allot to a tenure holder chak over largest part of his holding.(Para 28) (E-5)

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

1. I have heard Shri Ajay Pratap Singh Vats for the petitioner and Shri Upendra Singh Learned Standing Counsel appearing on behalf of the State Respondents. The petitioner is aggrieved by the order passed by the Consolidation Officer dated 11.10.2019 and also the order passed by the Settlement Officer Consolidtaion dated 16.11.2019 and the rejection of his Revision by the Deputy Director, Consolidation, by order dated 08.01.2020.

2. It is the case of the petitioner that in the proposal made by the Assistant Consolidation Officer, the petitioner was given two Chaks, one over Gata number 8Min, admeasuring 1.439 ha, and the other over Gata number 138Min along with 139 Min and 141 Min, admeasuring 1.337 ha. The petitioner's Chak over Gata number 8 Min was over his original holding but it was at a distance of about 3 km from the village therefore the petitioner moved an objection before the Consolidation Officer, Biswa, praying that his chak should be carved over Gata numbers 155 and 156, which were marked as Bachat land belonging to Gaon Sabha instead of over Gata number 8 Min. The land situated in Gata number 155 in 156 was in the vicinity of his house and of the village and it would lead to facilitating cultivation in a better manner in comparison to carrying out agricultural activities over land which was situated at a distance from the village as the petitioner intended to farm vegetables which required constant attention.

3. The demand made by the petitioner for conversion of his Chak over Gata number 155 in 156 was refused by the Consolidation Officer on the ground that the petitioner already had two chaks and giving him a Chak over Gata numbers 155 and 156 would mean that he would have three Chaks in the village, and also because Gata number 155 and 156 were not part of his original holding, and therefore carving out a Chak over them for him would mean allotment of an Udaan chak.

4. It has been argued by the learned counsel for the petitioner that Bachat land being that of the Gram Sabha and there being no objections from the Gram Sabha, his request ought to have been allowed by the Consolidation Officer.

It has been further argued that the grounds taken by the Consolidation Officer for rejection of his objections are against the statutory provisions given under section 19 (1) (e) of the U.P. Consolidation of Holdings Act 1953 (hereinafter referred to as "the Act").

5. It has been submitted that a perusal of section 19 (1)e of the Act would show that the proviso to the same makes it

permissible to allot three Chaks. Also, it provides for allotment of Chak at a place where the tenure holder has the largest part of his holding "*as far as possible*". The basic reason for providing Chak over original holding is to save the interest of the tenure holder and such tenure holder has every right to forego such a privilege. The learned counsel for the petitioner has argued that the phrase "*as far as possible*" only envisages convenience of the tenure holder. Also Section 19(1)(e) does not prohibit allotment of Udaan Chak or three Chaks to a tenure holder. More so, there was no objection by the Gram Sabha in whose name the Bachat land was recorded.

6. It has been submitted by the learned counsel for the petitioner that the petitioner preferred an Appeal to the Settlement Officer Consolidtaion but by the order dated 16.11.2019 his Appeal has been rejected on the same grounds as taken by the Consolidation Officer. The petitioner approached the D.D.C. in Revision but the same has also been rejected, this time taking different grounds altogether.

7. It has been argued by the learned counsel for the petitioner that the purpose of the Act is to facilitate a tenure holder in order to undertake better cultivation and the request for allotment of the said Gata numbers 155 and 156 was rejected only on the ground that it would lead to three Chaks being allotted to the petitioner which amounted to arbitrary exercise of power. The "*proviso*" appended to section 19 1(e) of the Act makes it permissible to allot three Chaks. The factors given under section 19 (1) (e) of the Act are merely directory in nature, the phrase "*as far as possible*" being not mandatory, and not accompanied by any sanction, the Consolidation Officer could have allotted a third Chak over Bachat land which land did not belong to anyone except for the Gram Sabha, which had not objected to such a request.

8. The learned Standing Counsel on the other hand has argued that there was no legal right of the petitioner that he be allotted land as per his choice. He has placed reliance upon judgements rendered by other Coordinate Benches of this Court in the cases of *Ram Bachan vs. Deputy Director of Consolidation, Varanasi 2001 (supplement) RD 847, and Smt Jagwanta v DDC, 2002 (93) RD 602. In Ram Bachan versus Deputy Director of Consolidation Varanasi (supra),* the petitioner filed an objection regarding the land in dispute that it was liable to be allotted to him as the same was situated near his house. On the other hand, the respondent claimed that the land in dispute was not a part of the original land of the petitioner therefore he had no right to get the same allotted in his favour. The Court observed that the petitioner had no legal right to claim allotment of land in dispute in his favour only because the said land was situated near his house.

9. In *Smt. Jagwanta (supra),* the petitioner had prayed for allotment of certain land which was proposed to be allotted to another, only on the ground that it was being used by her as a manure pit. The Consolidation Officer rejected the claim on the ground that the said plot was never earmarked for manure pit and therefore, the petitioner had no right to get the same allotted in her name. The Consolidation authorities had given a finding that from the map available on record it was apparent that between the house of the petitioner and the plot in dispute there was a Chakk Road. Therefore

the plot number 50 could not be said to be an adjoining plot; that the petitioner was not the original tenure holder of the said plot; and though the original tenure holder of the plot initially did not raise any objection with respect to allotment of plot number 50, however, that would not give any right to the petitioner for allotment of the said plot. The Court upheld the findings and recorded that plot number 50 was not originally a part of the petitioner's holding, therefore she could not claim the allotment of the said plot as of right, even if the provisions of Section 19 of the UP Consolidation of Holdings Act are held to be mandatory, although they are not, as has been held by this Court in several of its decisions.

10. The counsel for the State Respondents has also argued that the petitioner did not stand to lose anything by refusal of his claim by the Consolidation Authorities. None of the his legal rights had been infringed. He has also placed reliance upon paragraph 8 of *Bhola Rai versus Deputy Director of Consolidation Azamgarh and others* 2004 (96) RD 673; where a Coordinate Bench of this Court was considering the allegation made by the petitioner that the respondent had been allotted land which was the original holding of her husband and that the petitioners'' 'original holding' which consisted of 31 plots was therefore reduced in area. In the counter affidavit it came out that the plots allotted to the contesting respondent were part of the original holding of her husband. The Court perused the Chak map prepared at the stage of Settlement Officer, Consolidation. It observed that the original holding of the husband of the contesting respondent on plot number 829 and 853 and 854, was rightly excluded from the petitioner's Chak and he was allotted plots on his original holding. The Court observed that the petitioner's Chak was still on the main road and major part of plot number 838 was still with the petitioner and apart from that he was also allotted plot number 839 situated on the main road, though it was not part of his original holding. In sum and substance, the petitioner's original holding on plot number 838 had an area of 370 Are, on the roadside, but by the orders impugned he had been allotted plot number is 838 and 839 total area 680 Are, on the roadside and no prejudice was caused to the petitioner. The court observed that the petitioner could not claim, as a matter of right, for allotment of original holding of others in his chak. The chak map also made it clear that the Deputy Director of Consolidation allotted just double the area to the petitioner's original Holding on the roadside. There was no illegality or violation of principles as laid down in section 19 of the U.P. Consolidation of Holdings Act, nor any prejudice was shown to have been caused to the petitioner by the order of the Deputy Director Consolidation. The petition therefore was dismissed.

11. Learned Standing Counsel has argued that the Consolidation Officer rightly rejected the petitioners objections as it is evident from a perusal of the pleadings on record, including the memo of the Revision filed by the petitioner, that the petitioner had been initially proposed two chaks of land which land comprised of part of his original holding on Gata number 8 Min. and the petitioner wanted that some part of his Chak on Gata number 8 should be allowed to be surrendered by him, and that he may be granted a third Chak on Gata numbers 155 and 156 which were Bachat land, and over which admittedly the petitioner had no right. The petitioner

claimed allotment of such land only on the ground that it was situated near his residence.

12. It has been argued by the learned Standing Counsel that Section 19 enumerates the factors that have to be kept in mind while making allotment of Chaks. As has been held by this Court, such factors are the guiding principles and if chak allotment is done keeping in mind such principles and no illegality or infirmity is shown in the orders passed by the Consolidation Officer, this Court in Writ jurisdiction should not ordinarily interfere in orders passed by the learned courts below.

13. The learned Standing Counsel has argued that the petitioner was demanding allotment of chak over Bachat land which was the land to be used for common purpose. The learned counsel for the State Respondents has also placed reliance upon a judgment by the Supreme Court in *Johrimal versus Director of Consolidation of Holdings, Punjab* 1967(3)SCR 286; where the Supreme Court was considering the provisions of East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act 1948. The Scheme proposed under the said Punjab Act provided that owners of permanent '*ghers*' or enclosures will be permitted to retain them in their possession. One of the proprietors, Johrimal, made a '*gher*' in Khasra number 3942 and under the Scheme, this was to remain with him. The Director of Consolidation on the other hand reconsidered the matter and ordered that this particular piece of land i.e. Khasra number 3942, should be reserved for extension of Abadi for non-proprietors. The Director of Consolidation accordingly ordered that instead of being reserved for Johrimal, the plot should be kept for non-proprietors. Johrimal challenged the said order before the High Court and the Single Judge allowed the petition. Against this order the Director, Consolidation appealed under Clause 10 of the Letters Patent which was heard by a Full Bench, which by judgement dated 08.11.1960, allowed the appeal and reversed the order of the learned Single Judge and ordered that the writ petition should be dismissed. Johrimal challenged the said order before the Supreme Court.

14. The Supreme Court observed that the Punjab Act was passed to provide for compulsory consolidation of agricultural holdings and for preventing their fragmentation. Section 15 required the Consolidation Officer to provide for payment of compensation to any owner who was allotted a holding of less market value than his original holding and for the recovery of compensation from any owner who was allotted a holding of greater market value than that of his original holding. The Consolidation Officer's Scheme was subject to Appeal before the Settlement Officer, Consolidtaion, and a person aggrieved by the order of this Settlement Officer, Consolidtaion, could appeal to the State Government. Even where no appeal, was filed, the State Government could at any time, for the purpose of satisfying itself as to the legality or propriety of any order passed by the Officers under the Act, call for and examine the records of any case pending before or disposed of by such Officer, and could pass such order in Reference thereto as it thought fit, after giving opportunity of hearing to those who would be affected by such order. The Punjab Government by a notification had made Rules for reservation of Abadi land for proprietors as well as

non-proprietors. The land reserved for extension of Abadi was to be divided into plots of suitable sizes. For the plots allotted to proprietors, area of equal value was to be deducted from their holdings, but in case of non-proprietors including Harijan families, they were to be allotted without payment of compensation and they were to be deemed to be owners of the plots allotted to them. In any estate or estates where during consolidation proceedings there was no *Shamlat Deh* land, or such land was considered inadequate, land would be reserved for village Panchayat out of the common pool of the village, and proprietary rights in respect of such lands so reserved, would vest in the Panchayat of the estate or estates concerned and on behalf of the village the Panchayat would have the right to utilise income derived from such plots which were reserved for common needs and for the benefit of the estate or the estates concerned.

15. The Supreme Court held in *Johrimal (supra)* that the power given to the State Government under section 42 of the Punjab Act was to review any order passed or scheme prepared or confirmed on a petition made by any Officer under the Punjab Act. There was a requirement in the Statute that before a valid scheme could be published, the State Government after notice and giving an opportunity to the interested persons to be heard, could make such variation as was required in public interest. Section 42 of the Punjab Act by which the State Government had to exercise such power also permitted delegation of such power to the Director of Consolidation which was done in this case. It was also observed by the Supreme Court that the legislature could not have intended that land should be taken from proprietors only for common purposes. The intention must be that all proprietors should contribute rateably for such purposes. Land reserved for common purpose was to be under the management of the Panchayat and to be used for common needs and benefits of the estates concerned.

16. The Supreme Court relied upon *Attar Singh vs. State of U.P. 1959 Supplement SCR 928*; where the Court was considering a similar provision in a similar Act (the U.P. Act) and had observed that the land which is taken over is a small bit, which sold by it self would hardly fetch anything.

"The small bits of land are collected from various tenure holders and consolidated in one place and added to the land which might be lying vacant so that it may be used for the purposes of section 14 (e). A compact area is thus created and it is used for the purposes of the tenure holders themselves and other villagers.Form CH 41 framed under Rule 41 (a) shows the purposes to which this land would be applied, namely, (1),plantation of trees, (2) pasture land, (3)manure pits,(4) threshing floor, (5)cremation ground, (6)graveyards, (7)primary or other schools, (8)Play ground,(9) Panchayatghar and (10) such other objects. These small bits of land that are acquired from tenure holders are consolidated and used for these purposes, which are directly for the benefit of the tenure holders. They are deprived of a small bit and in place of it they are given advantages in a much larger area of land made up of the small bits and also of vacant land."

In other words the proprietor gets advantages which he could never have got apart from the Scheme. For example, if one wanted a threshing floor, a manure pit, land

for pasture, etc he would not have been able to have them on the fraction of his land reserved for common purposes.

17. The Supreme Court also answered the question in *Attar Singh (supra) "whether taking away property from the proprietors amounted to acquisition by the State of any land*?" The Supreme Court answered the question by asking further questions as to who was the real beneficiary?, 'was it the Panchayat or any other body?' It was observed that "*The title remained in the proprietary body i.e. the village Panchayat and in the revenue records the land would be shown as belonging "to all the owners and other right holders in proportion to their areas'. The Panchayat would manage it on behalf of the proprietors and use it for common purposes; it could not use it for any other purpose. The proprietors continued to enjoy the benefits derived from the use of and for common purposes. Although the non-proprietors would also derive benefits but their satisfaction and advancement enures in the end to the advantage of all the proprietors in the form of a more efficient agricultural community. The Panchayat as such does not enjoy any benefit. ...., it seems to us that the beneficiary of the modification of rights is not the State, and therefore there is no acquisition by the State within the second proviso*".

18. It has been argued by the learned counsel for the petitioner in rejoinder that Bachat land is different from reserved land, and the petitioner was not asking for any part of his Chak to be carved out of reserved land. The Learned counsel for the petitioner has placed reliance upon a judgement rendered by a Coordinate Bench of this court in case of *Ram Kumar and another versus Ziladhikari/ D.D.C. Muzaffar Nagar* 2002 (93) RD 403, wherein the coordinate bench after considering Section 19 A of the Act had observed that it shall be lawful for the Assistant Consolidation Officer, where in his opinion it is necessary or expedient to do so, to allot Chak on Bachat land, after determining the valuation of any land belonging to the State Government or any other local authority. It only requires the Assistant Consolidation Officer to declare in writing that it is proposed to transfer the rights of the public as well as of all individuals in or over that land to any other land specified in the declaration, and earmarked for that purpose, in a provisional consolidation scheme. The Coordinate bench also considered Section 19 subsection (3) after its amendment which permitted Assistant Consolidation Officer to allot, after determining its valuation, any portion of agricultural wasteland or any other land vested in the Gaon Sabha or any other local authority or any land used for public purpose to any tenure holder so as to form part of his holding. Where any land vested in the Gaon Sabha or the local authority is allotted to a tenure holder under sub section (5) of section 19, it shall be deemed to have been resumed by the State Government under the provisions of section 117 for which compensation shall be paid by the State Government to the Gaon Sabha or the local authority as the case maybe, and it shall be settled with the tenure holders to whom it has been allotted by the Assistant Consolidation Officer on payment of compensation for development if any carried out by the Gaon Sabha on it earlier. The Assistant Consolidation Officer is required only to make a note that it is necessary to amalgamate the land used for public purpose with any holding of a private person. He has only to make a declaration to that effect stating that it is

proposed to transfer the rights of the public as well as of all individuals in or over that land to any other land earmarked for the public purpose, in the statement of proposals, and whenever the rights are so transferred they shall stand extinguished from the land from which they are transferred and be created in the land to which they are transferred.

19. The learned counsel for the petitioner has placed reliance upon paragraph 11 & 12 of the judgement in Ram Kumar (supra). The relevant extract of para 11 is being quoted here in below: -

"Section 19 A also gives an idea that the land belonging to Gaon Sabha or the local authority can be allotted to a tenure holder. There is no prohibition in the allotment of land belonging to Gaon Sabha to a tenure holder. .....The Assistant Consolidation Officer has been fully empowered to allot any land belonging to the State Government or any other local authority or the land belonging to Gaon Sabha ....".

20. The relevant extract of paragraph 12 of the said judgement is being quoted here in below: -

"Thus the counsel for the petitioners is right in his submission that land belonging to State Government /Gaon Sabha even if it is for public purpose, can be allotted to a tenure holder in the consolidation proceedings and there is no lack of jurisdiction in the consolidation authorities in allotting the land for public purpose..." The only precondition for exercise of power given under section 19 A is that the Assistant Consolidation Officer should clearly write that it is proposed to transfer the rights of the public as well as of all individuals in and over that land, to any other land specified in the declaration and earmarked for that purpose, in the provisional consolidation scheme. ....."Thus public purpose land belonging to the Gaon Sabha cannot be allotted to a tenure holder unless any other land is specified in writing by the Assistant Consolidation Officer. The intention of the proviso is that public purpose be not defeated and if a land is earmarked for public purpose then it should not be allotted to any tenure holder unless any other land is specified to serve the public purpose. For example, if any pasture land is proposed to be allotted to tenure holder, the same cannot be done unless any other land is specified in writing to take the place of the land sought to be allotted. The proviso does not contemplate allotment ofPublic purpose land to tenure holders without there being any specification of any other land in which the rights of the public have to be adjusted. While allotting the land of Gaon Sabha it has to be kept in mind that the land of the Gram Sabhais basically for public purpose, public in general and society has interest in the public land. Public land should not be allotted only to serve individual interest, protection of ponds, tanks, mountains have been held to be necessary for environment protection and pollution control. Thus the Consolidation Officer allotting Gaon Sabha land should normally desist from allotting ponds, tanks, mountains, land in the nature of forest."

".....It has to be kept in mind that for protecting the public property and the interest of the public in general, the bodies which were entrusted with the said duties are often slack and not vigilant. The Gaon Sabha which is expected to protect its rights for the public in general occasionally abdicate their authority or

moves with self interest of persons occupying the office."

21. Having heard the learned counsel for the parties, this Court has also perused the order passed by the Consolidation Officer and finds that the petitioner's objections have been sufficiently dealt with. In the order dated 11.10.2019 the Consolidation Officer has observed that the chaks of the petitioner had been shown on the plots of land comprising his original holding. The land of plot numbers 155 and 156 was not part of the original holding of the petitioner, therefore, giving of Chak on such land would amount to allotment of an Udaan Chak to the petitioner. Moreover, it would lead to the petitioner being given three Chaks instead of two which was inappropriate.

22. In the order passed by the Settlement Officer Consolidtaion dated 16.11.2019 the Settlement Officer Consolidation, has observed that he had perused C.H. Form 23, the map of the village concerned and other related documents. The Consolidation Officer had allotted two Chaks of land to the petitioner but the petitioner wanted to surrender some land in one Chak comprising of plot number 8, and to be given allotment on plot numbers 155 and 156 which was Bachat land. The Settlement Officer Consolidation went into the valuation of each of the Chaks allotted to the petitioner and compared it with the original valuation of the plots of the petitioner and came to the conclusion that the petitioner did not stand to lose by the allotment finally made to him as he had been given two Chaks on his original plots of land. On the other hand, in case the petitioner's claim was admitted it would amount to allotting three Chaks instead of two to the petitioner which was not at all appropriate.

23. The Deputy Director of Consolidation, Sitapur, while considering the Revision filed by the petitioner also took the same view as was taken by the Consolidation Officer. He observed in the order that the petitioner had already been allotted two Chaks on plots comprising his original holdings. Also the demand of third Chak made by the Revisionist was inappropriate because he was asking for allotment of plot number 155 in 156, which were not part of his original holding, and would lead to three Chaks being allotted to the revisionist instead of two and the third Chak being an Udan Chak.

24. This Court also finds from a perusal of Annexure 4 to the petition which is a copy of C.H. form 23 (1), that the petitioner had a share in as many as 13 plots of land at the start of consolidation operations. Gata number 8 admeasuring 2.909 ha was one of the plots of original holding of the petitioner whereas the total holding of the petitioner adding up the shares in 13 plots was 2.942 ha only. It meant that the petitioner had only a minuscule share in all the other 12 plots of land that comprised his original holding. The Land which was later on allotted to him comprised of plot number 8 as his first Chak, and his second Chak comprised of parts of Gata numbers 138, 139 and 141. The total land which was allotted to him was 2.776 ha with a valuation of 85.06 paise comparable to the original valuation of 88.61 Paise. The loss of less than three Paise in valuation was more than compensated By allotment of two compact Chaks instead of a minuscule share in the other 12 plots.

25. In *Asbaran v DDC, 1986 RD 430*; this Court was considering an argument raised by the petitioner that the Deputy Director of Consolidation while considering the Revision, had by the impugned order reduced the Chak of the petitioner by more than 25% of the land originally held by him. This according to him, could not have been done by the Deputy Director of Consolidation being violative of provisions contained in the proviso to section 19 1(b) of the Act. The Court observed that in the process of adjustment of Chaks made by the Deputy Director of Consolidation while deciding the Revisions and after hearing the parties, he could allot chaks to the parties which he may deem fit and proper on the facts of the case, in exercise of power under section 48 of the Act. The reduction in the allotted area to the extent of 28% from that of the original holding appears to have occurred on account of the fact that the petitioner had been allotted better quality land of exchange ratio of 12 Annas, as against the land taken out from his Chak which was valued at the exchange ratio of 8 to 10 Annas. Such allotment made by the Deputy Director of Consolidation Could not be held to be vitiated only on the ground that no written permission had been taken from the Director of Consolidation as envisaged under the proviso to section 19 1(b) of the Act.

26. The Court observed that Section 19 lays down the principles for guidance of Assistant Consolidation Officer in preparation of the provisional scheme which precedes consolidation. These principles regulate the powers of the Assistant Consolidation Officer. It is true that each one of the sub sections contains the qualifying words "*as far as possible*". This phrase really means that the principles are to be observed unless it is not possible to follow them in the particular circumstances of a case. This qualification was absolutely necessary in view of the fact that the process of compulsory consolidation is a very difficult and complicated one. In the peculiar conditions prevailing in the State, fragmentation of holdings has through a process of centuries, reached such a stage that there is no straight road back towards consolidation. What can be done in one village may not be possible in another. In view of the fact that consolidation is a pressing necessity, it was necessary to add these qualifying words. But that does not render the principles enunciated in Section 19 ineffective or illusory.

27. The Court in *Asbaran (supra)* referred to its own decision in *Sri Nath versus Deputy Director of Consolidation Sultanpur, 1986 AWC 248*, that the permission of the Director of Consolidation as envisaged under the proviso to section 19 1(b) would be necessary if the subordinate consolidation authorities would make allotment of a Chak having difference of more than 25% without obtaining prior permission. However where the Director of Consolidation or the Deputy Director of Consolidation, who exercises delegated power of the Director of Consolidation, has made allotment of such a chak to a tenure holder having a different of more than 25% in area, it would not be invalid because the permission for such allotment would be inherently manifest therein. If the authority which is required to give permission to an allotment of Chak having difference in area by more than 25% itself makes the allotment of such a Chak in the process of making appropriate adjustment in the Chaks of the parties, while deciding a revision, it cannot be

taken to be invalid and without jurisdiction and no interference would be called for by this Court in exercise of Writ jurisdiction.

28. An argument was raised by the learned counsel for the petitioner that the Deputy Director of Consolidation had allotted an Udaan Chak to the petitioner against the provisions of section 19. The Court observed "*it is nowhere provided in Section 19 of the Act that a tenure holder cannot be allotted a Chak having no part of his original holding. The requirement under section 19 1(b) of the Act is that the tenure holder, as far as possible, be allotted a compact area at a place where he holds the largest part of his holding, according to section 19 1(f) what a tenure holder, as far as possible, is to be allotted is a plot on which exists his private source of irrigation, or any other improvement, together with an area in the vicinity equal to the valuation of the plot originally held by him there. This provision contained in Section 19 1(f) enjoins upon the consolidation authorities to allot a plot on which exists the tenure holder's private source of irrigation or any other improvement. Apart from it, no other provisions of section 19 of the Act enjoin upon the consolidation authorities to make allotment of Chak to the tenure holder on his original plot, and the consolidation authorities in view of the provisions contained in section 19 1(e) of the Act are required to allot, as far as possible, a compact area to the tenure holder at a place where he holds his largest part of holding. If while making allotment of a Chak to the tenure holder the consolidation officer finds it difficult to make allotment of a Chak to him of a compact area at a place where he held the largest part of his holding, then, he has to assign reasons for not doing so. If no good reasons are shown, the allotment would certainly be held to be irregular and cannot be sustained. The aforesaid provisions contained in section 19 (1) of the Act, however cannot be construed to make it imperative on the consolidation authorities to allot chak of compact area to a tenure holder imperatively including there in some plot of his original holding.* ***The requirement of such provision, in my opinion is that the tenure holder has to be allotted a Chak of a compact area at a place where exists the largest part of his holdings*** *and not on the plot of his largest part of holding. In making allotment of Chaks equity amongst various tenure holders has to be adjusted, and as such, if it is not possible to include some of the original Chak of the tenure holder in the allotted chak, then the allotment of Chaks cannot be said to be invalid or without jurisdiction on the ground that no plot of original holding of the tenure holder has been included in his Chak, although a chak of compact area has been allotted at one place and in the vicinity where the tenure holder holds the largest part of his holding. The requirement of allotting original plot of the holding to the tenure holder in his Chak has been mandated only in section 19 1(f), according to which, if there is a private source of irrigation or other improvement on the plot in question, then it has got to be allotted to the Chak of the tenure holder. The allotment of chak in violation of the provisions contained in section 19 1(f) will certainly make the allotment illegal being violative of specific provisions, but in my opinion, an allotment of Udaan Chak cannot be taken to be illegal and without jurisdiction, if such a chak has been allotted at a place quite near to original land held by the tenure holder in its vicinity, and not excessively exceeding the valuation of his original plots in that*

sector. It can only be said to be irregular in those cases where the tenure holder is not allotted chak at a place in the vicinity of the original land held by him in the sector/area, but the allotment of Udan Chak to a tenure holder at a place quite near to his original plot of holding cannot be said to be invalid merely on the ground that being Udaan chak it could not be legally allotted. I find that there exists no legal bar to the allotment of Udan Chak or prohibiting allotment of such a Chak .....".

29. A consideration of this Court's observation in *Asbaran (supra*) and *Srinath* (supra) makes it amply clear that the provision of Section 19 are not to be lightly ignored. However, Section 19 only provides two conditions which have to be mandatorily followed. One relates to allotment to a tenure holder of chak upon the land to which he has already made some improvements, the second requires the authorities to allot to a tenure holdder chak over the largest part of his holding. If a chak holder is to be alloted land which was not part of his original holding, i.e., an udaan chak, the same must necessarily be allotted in the vicinity of the original land held by him in that sector/ area. The principles laid down in Section 19 are guiding factors hedged by the phrase:- "*as far as possible*" only to better facilitate consolidation and allotment of compact areas to facilitate better utilization of land and other resources.

30. This court in *Jeet Narain versus Deputy Director of Consolidation and others*, 1983 Allahabad Law Journal 998 ,has observed in paragraph 8 of its judgement that "*no tenure holder can be allotted any land by the consolidation authorities merely for the purpose of extension of Abadi or for using it as a Sehan land, if he is not otherwise entitled to get the land allotted to him in his Chak near village Abadi. If a tenure holder is holding some land in his original holding near Village Abadi he can certainly be allotted land in his Chak to that extent at that place. He may or may not utilise that plot for cultivatory purpose and may use it for extension of Abadi or use it as Sehan land. But if he had no land near the village Abadi in his original holding, he would not be entitled to get a Chak allotted near Abadi merely on the ground that his house is situated near the land in question and he would require that land for being utilised as his Sehan or for extension of his Abadi. No land can be allotted to him at the cost of other tenure holders merely for the aforesaid purpose if he is not otherwise entitled to get a Chak allotted to him near the village Abadi as aforesaid. The consolidation authorities certainly make necessary reservation of land for the purpose of extension of Abadi, but such land would belong to the Gaon Sabha, and has to be allotted by it in accordance with the provisions contained in U.P. Zamindari Abolition and Land Reforms Act. No land can, however be reserved nor it can be allotted by the consolidation authorities to any particular individual tenure holder, merely on the ground that he would require it for extension of Abadi or for being utilised as Sehan land, if otherwise he is not entitled to land at that place near village Abadi as mentioned above...."*

31. In *A.M. Allison versus B.L. Sen AIR 1957 Supreme Court 227,* the Supreme Court has observed in paragraph 11 that proceedings for issuing writ of Certiorari is not a matter of course and the High Court has power to decline the relief, in case it is found that no failure of justice has occurred. In *Rai Shivendra Bahadur versus*

Governing Body of Nalanda College, Bihar Sharif, AIR 1962 Supreme Court 1210, it has been held that a writ of mandamus can be issued only if the petitioner has a legal right to enforce and the performance of a legal duty which has been cast upon the respondents.

32. This Court finds no factual or legal infirmity in the orders impugned. The petitioner's claim if acceded to would lead to fragmentation, instead of consolidation of holdings, and would be against the very object of the Act which is to create compact holdings of lesser number than originally possessed by the proprietors.

33. The writ petition is ***dismissed.*** No order as to costs.

(2021)06ILR A270
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.06.2021

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Crl. Misc. Bail Application No. 16781 of 2021

Deepak Sharma ...Applicant
Versus
State of U.P. ...Opp. Party

Counsel for the Applicant:
Sri Manvendra Narain Pathak

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

(a) Bail - In view of the nature of evidence, the period of detention already undergone, the unlikelihood of early conclusion of trial and also the absence of any convincing material to indicate the possibility of tampering with the evidence, the applicant may be enlarged on bail. (Para 8)

Application Allowed. (E-8)

List of Cases cited:

1. Dataram Singh Vs St.of U.P. & anr. (2018) 3 SCC 22

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

1. Heard learned counsel for the applicant as well as learned A.G.A. appearing for the State and perused the record.

2. This application has been filed seeking the release of the applicant on bail in Case Crime No. 252 of 2020, under Section 3(1) of U.P. Gangster and Anti Social Activities (Prevention) Act, 1986, Police Station Lar, District Deoria.

3. The chief plank of the submissions made on behalf of accused is that in all cases which have been made the basis to impose the provisions of Gangster Act against the accused, he has already been granted bail by the Court. Contention is that the provisions of the Act have been ill-used by the Police in order to perpetuate the detention of the applicant in jail anyhow even though the offence under the aforesaid Act is not made out. Submission is that the applicant is not a gangster and has never acted or conducted himself as such. Counsel for the applicant has also tried to demonstrate that the alleged previous offences which are said to have been committed by the applicant can at the most be said to be stray incident of breach of law having no nexus with the definition of a gangster as has been provided in the Act.

4. Further submission is that as it has been mentioned in paragraph 9 of the

affidavit filed in support of the bail application that the applicant has already been released on bail in all the cases on the basis of which the provisions of the Act were imposed, it shall not be much justified to continue the incarceration of the applicant. Submission is also that the applicant is not guilty of having committed any offence under the Gangster Act. It has also been pointed out that the accused is in jail since 14.10.2020 and that in the wake of heavy pendency of cases in the Court, there is no likelihood of any early conclusion of trial.

5. Learned A.G.A. has opposed the prayer for bail but could not dispute the fact of applicant having been released on bail in all the criminal cases which have been shown to be the basis of imposing the provisions of the Act.

6. 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 larger mandate of the Article 21 of the Constitution of India and the law laid down by the Hon'ble Apex Court in the case of Dataram Singh vs. State of UP and another, (2018) 3 SCC 22, this Court is of the view that the applicant may be enlarged on bail.

7. Let the applicant- Deepak Sharma, involved in Case Crime No. 252 of 2020, under Section 3(1) of U.P. Gangster and Anti Social Activities (Prevention) Act, 1986, Police Station Lar, District Deoria, be released on bail on his executing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned on the following conditions :-

(1) The applicant will not make any attempt to tamper with the prosecution evidence in any manner whatsoever.

(2) The applicant will personally appear on each and every date fixed in the court below and his personal presence shall not be exempted unless the court itself deems it fit to do so in the interest of justice.

(3) The applicant shall cooperate in the trial sincerely without seeking any adjournment.

(4) The applicant shall not indulge in any criminal activity or commission of any crime after being released on bail.

(5)The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad or certified copy issued from the Registry of the High Court, Allahabad.

(6) 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

8. It may be observed that in the event of any breach of the aforesaid conditions, the court below shall be at liberty to proceed for the cancellation of applicant's bail.

9. It is clarified that the observations, if any, made in this order are strictly confined to the disposal of the bail application and must not be

construed to have any reflection on the ultimate merits of the case.

(2021)06ILR A272
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 16.06.2021

BEFORE

THE HON'BLE IRSHAD ALI, J.

Service Single No. 3458 of 2009
Along with other cases

U.P. Senior Basic 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.

Service Law - U.P. Basic Education Act, 1972, Section 19 - U.P. Recognized Basic Schools (Recruitment and Condition of Service of Teachers and other Conditions) Rules, 1975- U.P. Recognized Basic Schools (Junior High Schools) (Recruitment and Conditions of Service of Teachers) Rules (1978) , R.19 - U.P. Recognised Basic Schools (Junior High Schools) (Recruitment And Conditions Of Service Of Ministerial Staff And Group 'D' Employees) Rules, 1984 - Old Pension Scheme (OPS), New Pension Scheme (NPS) - Claim for pensionary benefits under old scheme - Petitioners appointed much prior to enforcement of NPS w.e.f 01.04.2005 - *Held* - Merely because the institution was brought within purview of payment of salaries act vide notification issued on 02.12.2006 i.e. after cut off date of enforcement of applicability of NPS cannot be a ground for depriving the teachers and non teaching staff to be covered under old pension scheme (OPS) (60, 71)

Management 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 - respondents directed to treat the petitioners to be covered under Old Pension Scheme and to pay pension to the retired teaching and non teaching staff accordingly (Para 73)

Allowed. (E-4)

List of Cases cited:

1. Budhiram Vs St. of U.P. & ors. CMWP No.45217 of 2012 dt. 26.09.2012

2. U.P. Senior Basic Shikshak Sangh Sindhi Vidyalaya Vs. St. of U.P. & ors. S.A. No.123 of 2013

3. Shailendra Daina & ors. Vs S.P. Dubey & ors. 2007 (5) SCC 535

4. N. Suresh Nathan & anr. Vs. U.O.I. & ors. 1992 Supp. (1) Scc 584

5. Rajinder Singh (Dr.) Vs. St. of Pun. & ors. 2001 (2) UPLBEC 1502

6. Shyam Sadan Singh (Dr.) Vs. Chancellor, DDU University of Gorakhpur & ors. 2002 (1) UPLBEC 152

7. Girdhari Lal Shankwar Vs. St. of U.P. & ors. 2014 (1) UPLBEC 657

8. Narinder S. Chadha & ors. Vs. Municipal Corporation of Greater Mumbai & ors. 2015 (33) LCD 1743

(Delivered by Hon'ble Irshad Ali, J.)

(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 100 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 08.03.2020 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

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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, 1972 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 1970 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 100 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, 1972 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 कम 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)06ILR A295
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 14.06.2021

BEFORE

THE HON'BLE RAMESH SINHA, J.
THE HON'BLE VED PRAKASH VAISH, J.

Service Bench No. 9541 of 2021

State of U.P. & Ors. ...Petitioners
Versus
Neeraj Verma ...Respondent

Counsel for the Petitioners:
C.S.C.

Counsel for the Respondents:
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U.P. Government Servant (Discipline and Appeal) Rules (1999) – Rule 9 Sub-rule (2), (4) - Reasons to be recorded - Compliance mandatory - obligatory upon disciplinary authority to record reasons at two different stages - one, when it disagrees with the findings of the inquiry officer under sub-rule (2) and, secondly, when it decides to pass an order of punishment after considering the reply given by the delinquent employee under sub-rule (4) - Reasons, are required to be recorded by the disciplinary authority as to why the explanation given by the delinquent employee is or is not satisfactory - non-observance of Rule 9(4) is fatal since its compliance is mandatory (Para 13)

Enquiry officer (E.O.) exonerated charged employee of all charges - Disciplinary Authority (D.A.) disagreed with the report of enquiry officer - however without recording/mentioning any reason with respect to the point on which D.A. not agreed with findings of E.O. straightaway issued show cause notice - charged employee submitted reply - without considering the issue raised by the claimant/respondent in its reply to the show cause notice, D.A. passed the order of punishment – *Held*- Punishment order against principle of natural justice - Order of Tribunal in setting aside punishment, proper (Para 14)

Dismissed. (E-4)

List of Cases cited:

1. M.D. ECIL Vs B. Karunakaran AIR 1994 SC 1074

2. St. of U.P. & anr. Vs Manmohan Nath Sinha & anr. 2010 (8) SCC 310

3. Chairman, L.I.C. of India & ors. Vs A. Masilamani : 2019 (6) SCC 530.

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

(1) The Court has convened through **Video Conferencing.**

(2) Heard Shri Mohit Jauhari, learned Standing Counsel for the State/petitioners.

(3) By means of the instant writ petition under Article 226 of the Constitution of India, the petitioner is challenging the judgment and order dated 26.02.2019 passed by the State Public Services Tribunal, Lucknow (hereinafter referred to as "**the Tribunal**") in Claim Petition No. 253 of 2018 : *Neeraj Verma Vs. State of U.P. and others*, whereby the Tribunal, while allowing the claim petition, quashed the order of punishment dated 30.11.2017 and directed that if any service benefits are withheld on account of the punishment order dated 30.11.2017, the claimant/respondent is

entitled to get the same, in accordance with law.

(4) Shorn off unnecessary details, the brief facts of the case are that while the claimant/respondent was working as District Excise Officer, Balrampur, a departmental inquiry against him was instituted under Rule 7 of the U.P. Government Servants (Discipline and Appeal) Rules, 1999 vide order dated 09.07.2015 on the ground that he committed various irregularities with regard to the realization of basic license fee, non-deposition of the Challan license fees amounting to Rs.5,64,250/- till the date of special audit, non-deposition of the challan license fees of 56 shops of countrymade liquor, 08 shops of foreign liquor, 11 beer shops and non-deposition of the security amount of 81 shops of countrymade liquor, 14 shops of foreign liquor, 06 beer shops. The Joint Excise Commissioner, Gorakhpur Zone, Gorakhpur was appointed as the enquiry officer to conduct the departmental enquiry in the matter of the claimant/respondent.

(5) A charge-sheet dated 03.07.2015 was served upon the claimant/respondent, levelling eight charges against him. After receipt of the charge-sheet, the claimant/respondent had submitted his reply dated 21.08.2015 to the Enquiry Officer. Thereafter, the Enquiry Officer has submitted his report dated 09.11.2015 to the Disciplinary Authority, exonerating the claimant/respondent from all the charges but the Disciplinary Authority, after examining the enquiry report, disagreed with the report of the enquiry officer and after finding the claimant/respondent responsible for charges no. 6, 7 and 8, issued a show cause notice dated 26.04.2016 to the claimant/respondent. On receipt of the show cause notice dated 26.04.2016, the claimant/ respondent submitted his reply dated 11.05.2016, stating therein that no loss of revenue was caused to the Government instead all efforts were made towards increasing the revenue generated through liquor sale. Thereafter, the Disciplinary Authority, vide order dated 30.11.2017, concluded the disciplinary proceedings by awarding punishment of stoppage of one increment temporarily for a period of one year and also awarded censure entry to the claimant/respondent.

(6) Feeling aggrieved by the punishment order dated 30.11.2017, the claimant/respondent has approached the Tribunal by filing Claim Petition No. 253 of 2018. The Tribunal, after hearing the learned Counsel for the parties and going through the record, allowed the claim petition vide order dated 26.12.2019, which is impugned in the instant writ petition.

(7) Learned Counsel for the petitioners has argued that the Tribunal, while passing the impugned order, has failed to consider the most relevant fact that there was an admission on the part of the claimant/respondent with regard to the delay in depositing the basic license fees and the security amount of the shops and, therefore, the charge levelled against him vide charges no.6, 7 and 8 were proved on the basis of available material evidences as well as on the own admission of the claimant/respondent and, therefore, the disciplinary authority took dissenting opinion and has given show cause notice to the claimant/respondent, to which the claimant/respondent submitted his reply. Thereafter, the Disciplinary Authority, after due process of law, found that the charge nos. 6, 7 and 8 stand proved and, therefore,

the punishment order has rightly been passed against the claimant/respondent but the Tribunal has erred in quashing the order of punishment.

(8) It has been argued by the learned Counsel for the petitioners that the punishment order is well reasoned and speaking and also contains the reasons for coming to the conclusion for awarding the punishment of stoppage of one increments with temporary effect for one year. He also argued that even if the Tribunal had noticed certain infirmities that the version of the respondent in his reply/explanation given in reply to the show cause notice was not discussed in the punishment order by the disciplinary authority, it could have remanded the matter to the disciplinary authority for removing the defects as observed by the Tribunal but the Tribunal has erred in quashing the punishment order and has also allowed the claim petition with all the consequential benefits, which is in fact without jurisdiction and also against the principle of law laid down by the Apex Court in **M.D. ECIL Vs. B. Karunakaran** : AIR 1994 SC 1074, **State of U.P. and another Vs. Manmohan Nath Sinha and another** : 2010 (8) SCC 310 and **Chairman, Life Insurance Corporation of India and others Vs. A. Masilamani** : 2019 (6) SCC 530.

(9) We have heard learned Counsel for the petitioner and gone through the impugned order.

(10) It is not in dispute that the disciplinary proceedings were initiated against the claimant/respondent under the U.P. Government Servant (Discipline and Appeal) Rules, 1999 (hereinafter referred to as "**1999 Rules**") in which there is a complete mechanism for conducting the disciplinary proceeding.

(11) Rule 9 of 1999 Rules provides for action on inquiry report and reads as under:

*"**9. Action on Inquiry Report**.- (1) The disciplinary authority may, for reasons to be recorded in writing, remit the case for re-inquiry to the same or any other Inquiry Officer under intimation to the charged Government servant. The Inquiry Officer shall thereupon proceed to hold the inquiry from such stage as directed by the Disciplinary Authority, according to the provisions of Rule 7.*

(2) The Disciplinary Authority shall, if it disagrees with the findings of the Inquiry Officer on any charge, record its own findings thereon for reasons to be recorded.

(3) In case the charges are not proved, the charged Government servant shall be exonerated by the disciplinary authority of the charges and inform him accordingly.

(4) If the disciplinary authority having regard to its findings on all or any of charges is of the opinion that any penalty specified in Rule 3 should be imposed on the charged Government servant, he shall give a copy of the inquiry report and his findings recorded under sub-rule (2) to the charged Government servant and require him to submit his representation if he so desires, within a reasonable specified time. The disciplinary authority shall, having regard to all the relevant records relating to the inquiry and representation of the charged Government servant, if any, and subject to the provisions of Rule 16 of these rules, pass a reasoned order imposing one or more penalties mentioned in Rule 3 of these rules and communicate the same to the charged Government servant."

(12) Sub-rule 2 of Rule 9 of the 1999 Rules clearly provides that if the disciplinary authority disagrees with the findings of the Inquiry Officer on any

charge, it shall record its own finding thereto with the reasons. Sub-rule (4) of Rule 9 of the 1999 Rules further requires that if the disciplinary authority is of the opinion that the Government servant deserves imposition of some penalty under Rule 3, he shall furnish a copy of the inquiry report along with his findings recorded, if any, under Sub-rule 2 of Rule 9 to the delinquent employee and would allow him reasonable time to submit a reply/representation. After receiving the representation, the disciplinary authority shall again consider the aforesaid material along with the reply, if any, and pass a reasoned order imposing one or more penalty mentioned in Rule 3 and communicate the same to the delinquent employee.

(13) From the aforesaid, it transpires that when the rule framing authority itself has made separate provision, making it obligatory upon the disciplinary authority to record reasons at two different stages, one, when it disagrees with the findings of the inquiry officer and, secondly, when it decides to pass an order of punishment after considering the reply given by the delinquent employee against the findings of disagreement of the disciplinary authority, then it is obligatory upon the disciplinary authority to follow such procedure strictly. The reasons contained in the disagreement note constitute the ex parte view taken by the disciplinary authority against the findings recorded by the inquiry officer. When it is communicated to the delinquent employee and he submits its reply, the disciplinary authority is benefited with the explanation given by the delinquent employee. In order to find out as to whether it would like to stick to its earlier view of disagreement with the finding of the inquiry officer or the same needs to be changed, modified, partly or wholly in the light of explanation given by the delinquent employee, it has to apply its mind again. The reasons, therefore, are required to be recorded by the disciplinary authority as to why the explanation given by the delinquent employee is or is not satisfactory. The purpose and objective of reasons to be recorded under Sub-rule 2 and 4 of Rule 9 are different. They are to be recorded at different stages with slightly different material inasmuch as at the former stage, the stand of the delinquent employee is not available to the disciplinary authority while in the later case it is available. We, therefore, are clearly of the view that non-observance of Rule 9(4) is fatal since its compliance is mandatory. If the delinquent employee after communicating its disagreement note and inquiry officer's finding to the delinquent employee and after receiving the reply failed to pass a reasoned order imposing punishment upon the delinquent employee, such order would not be tenable in law and has to be set aside.

(14) In the present case, a perusal of the impugned order transpired that the inquiry officer exonerated the claimant/respondent of all the charges. However, the Disciplinary Authority disagreed with the findings particularly in respect to charges No.6, 7 and 8, and without recording/mentioning any reason with respect to the point on which the Disciplinary Authority has not agreed with the findings of the inquiry officer, straightaway issued a show cause notice to the claimant/ respondent, who, after receipt of the show cause notice, submitted his reply, but without considering the issue raised by the claimant/respondent in its reply to the show cause notice, the Disciplinary Authority has passed the order

of punishment, which has been challenged by the claimant/respondent in Claim Petition No. 253 of 2018. The Tribunal has also found that so far as delayed payment of the license fee is concerned, the Excise Commissioner had fixed 15.04.2015 for deposition of the license fee and prior to it, the claimant/respondent has deposited the license fee. The Tribunal has also opined that the punishment order is against the principle of natural justice. In these backgrounds, vide impugned order, the Tribunal allowed the claim petition and quashed the order of punishment with a direction that if any service benefits if withheld on account of the punishment order dated 30.11.2017, the claimant/respondent is entitled to get the same, in accordance with law.

(15) Considering the facts and circumstances of the case, we are of the view that there is no illegality or infirmity in the impugned order passed by the Tribunal.

(16) The writ petition lacks merit and is liable to be dismissed, which is hereby **dismissed**.

(17) Costs easy.

(18) 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.

(19) 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)06ILR A299
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 22.06.2021

BEFORE
THE HON'BLE CHANDRA DHARI SINGH, J.

Service Single No. 24163 of 2019
Connected with
Service Single Nos. 3522 of 2018, 33850 of 2019, 14474 of 2018, 19124 of 2018, 22992 of 2018, 29564 of 2018, 5246 of 2019, 34847 of 2019, 31120 of 2019, 1227 of 2020, 2346 of 2020, 1930 of 2020, 2283 of 2020, 3920 of 2020, 5096 of 2020, 4809 of 2020, 8430 of 2019, 13450 of 2020, 19826 of 2020, 612 of 2021, 18174 of 2020, 5117 of 2018 & 24568 of 2019

Pankaj Singh & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Laltaprasad Misra, Manoj Kumar Mishra

Counsel for the Respondents:
C.S.C., Gaurav Mehrotra

A. Constitution of India - Art. 162, Art. 309 Proviso - U.P. Directorate of Treasuries Ministerial Service Rules (1978) , Rule 4, 5 - Policy decision taken by the State in exercise of its jurisdiction under Article 162 would be subservient to the recruitment rules framed by the State either in terms of a legislative act or the proviso appended to Article 309 - Government order(s)/administrative order(s)/executive order(s)/ executive instruction cannot override, amend or supersed the statutory rules framed under the proviso to Article 309 - Any order, instruction, direction or notification issued in exercise of the executive power of the State, which is contrary to any statutory

provisions, is without jurisdiction and is nullity (Para 81, 84, 85)

Held – G.O. dated 21.03.1990 whereby the post of Routine Grade Clerk/Junior Clerk/Assistant Treasury Accountant Grade - II and Senior Clerk/Assistant Treasury Accountant Grade - I was merged thereby creating a new substantive post of Assistant Treasury Accountant is violative of Rule 5 of 1978 Rules as the said rule does not provide for any such post - if the post of Senior Clerk which has been re-designated as Assistant Treasury Accountant, is treated to be filled by way of direct recruitment, the avenues of promotion which are available to Routine Grade Clerk under the 1978 Rules would be taken away - entire provisions of recruitment has been amended/changed by the administrative order(s), which cannot be done as an executive order cannot go against or override the express statutory prescriptions. (Para 78, 83)

B. Constitution of India, Art.16 - Selection - *candidates to be selected for appointment* - legitimate expectation & vested right - there is no legal right vested in the *candidates to be selected for appointment* - Even selected candidates have only "a right to be considered" whereas in the facts of the present case, petitioners are not even selected for the post in question - such petitioners have no legal right to be appointed for the post in question (Para 89)

C. Constitution of India , Art.16 (1) - Promotion - Right to be considered for promotion - Article 16(1) provides to every employee otherwise eligible for promotion or who comes within the zone of consideration - a fundamental right to be "considered" for promotion - Equal opportunity means the right to be "considered" for promotion - If a person satisfies the eligibility & zone criteria but is not considered for promotion, then there will be a clear infraction of his fundamental right to be "considered" for promotion, which is his personal right (Para 92)

Partly allowed. (E-4)

List of Cases cited:

1. Y.V. Rangaiah Vs J. Sreenivasa Rao (1983) 3 SCC 284

2. N.T. Devin Katti & ors. Vs Karnataka Public Service Commission & ors. 1990 (3) SCC 157

3. Commissioner of Police Vs Gordhandas Bhanji AIR 1952 SC 16

4. Mohinder Singh Gill & anr. Vs Chief Election Commissioner & ors. (1978) 1 SCC 405

5. East Coast Railway & anr. Vs Mahadev Appa Rao & ors. (2010) 7 SCC 678

6. P. Mahendran & ors. Vs St. of Karn. & ors. (1990) 1 SCC 411

7. Mohd. Raisul Islam & ors. Vs Gokil Mohan Hazarika & ors. (2010) 7 SCC 560

8. B.L. Gupta & anr. Vs M.C.D. (1998) 9 SCC 223

9. J.C. Yadav & ors. Vs St. of Har. & ors. (1990) 2 SCC 189

10. Satyendra Kumar & ors. Vs Rajnath Dubey & ors. (2016) 14 SCC 49

11. Smt. Swaran Lata Vs U.O.I. & ors. (1979) 3 SCC 165

12. Sant Ram Sharma Vs St. of Raj. & ors. AIR 1967 SC 1910

13. Shankarsan Dash Vs U.O.I. (1991) 3 SCC 47

14. Lt. CDR. M. Ramesh Vs U.O.I. & ors. (2018) 16 SCC 195

15. Jai Singh Dalal Vs St. of Har. 1993 Supp (2) SCC 600

16. U.O.I. & ors. Vs Soma Vs St. of U.P. & ors. AIR 1997 SC 1446

18. U.O.I. & ors. Vs S.L. Abbas (1993) 4 SCC 357

19. Jagjit Singh Vs St. of Pun. (1978) 2 SCC 196

20. V.T. Khanzode Vs R.B.I. AIR 1982 SC 917

21. Punit Rai Vs Dinesh Chaudhaty (2003) 8 SCC 204

22. St. of Ker. & anr. Vs Chandra Mohan (2004) 3 SCC 429

23. M/s. Bishamber Dayal Chandra Mohan Vs St. of U.P. & ors. AIR 1982 SC 33

24. Rai Sahib Ram Jawaya Kapur & ors. v. St. of Pun. AIR 1955 SC 549

25. Jatinder Kumar & ors. Vs St. of Pun. & ors.. (1985) 1 SCC 122

26. S.S. Balu Vs St. of Ker. (2009) 2 SCC 479

27. Rajasthan Public Service Commission Vs Chanan Ram & anr. (1998) 4 SCC 202

28. S.B. Bhattacharjee Vs S.D. Majumdar (2007) 10 SCC 513

(Delivered by Hon'ble Chandra Dhari Singh, J.)

1. Since common questions are involved in all the above-mentioned writ petitions, they are being decided together.

2. Mainly, there are three categories of writ petitions:

(I) Petitions preferred by persons working on the post of Junior Clerk/Routine Grade Clerk who have challenged Advertisement No.12-Exam/2016 dated 05.07.2016 issued by U.P. Subordinate Service Selection Commission (hereinafter referred as 'the Commission') for holding direct recruitment on the post of Assistant Treasury Accountant. In the said category of writ petitions, the petitioners have also prayed for a direction to be issued to District Magistrates of their respective districts to consider them for promotion to the post of Senior Clerk/Assistant Treasury Accountant in accordance with The U.P. Treasury Ministerial Service Rules, 1978 (hereinafter referred as "1978 Rules");

(II) Petitions preferred by persons who have challenged order dated 25.07.2019 passed by Government of U.P. whereby requisition dated 23.06.2016 sent to the Commission for making direct recruitment to the post of Assistant Treasury Accountant and advertisement dated 05.07.2016 have been withdrawn; and

(III) Petitions preferred by persons for a direction to be issued to the respondents for declaration of result of selection held by the Commission on the post of Assistant Treasury Accountant pursuant to Advertisement dated 05.07.2016.

3. Before proceeding further with the case(s) in hand, it would be appropriate to first take a look at history of the litigation, which are as follows:-

(i) On 20.11.1987, Government of U.P. in exercise of power conferred under Rule 4 of 1978 Rules issued a Government Order thereby changing the nomenclature of posts as indicated in 1978 Rules and re-designated the posts of Routine Grade Clerk/Junior Clerk as Assistant Accountant Grade - II and Senior Grade Clerk as Assistant Treasury Accountant Grade - I. The minimum educational qualification for direct recruitment to the post of Assistant Treasury Accountant Grade - II was prescribed as a Bachelor Degree in Maths or Commerce (Accountancy) from a recognised University.

(ii) On 21.03.1990, Government of U.P. exercised its power under Rules 4 and 26 and issued a Government Order implementing the recommendations of the Pay Committee (1989) and by merging the post of Assistant Treasury Accountant Grade - I and Assistant Treasury Accountant Grade - II together created the post of "Assistant Treasury Accountant". It

was also decided that 72 posts of Assistant Treasury Accountant Grade - II be re-designated as Junior Clerks and educational qualification for Junior Clerks would be Intermediate (Commerce with Accountancy) and recruitment on the post of Junior Clerk be made through the selection board.

(iii) The State Government decided to fill up the post of Assistant Treasury Accountant by direct recruitment. The said decision had to be taken as only 72 posts of Junior Clerks existed after restructuring the cadre and it was impossible to fill all the posts of Assistant Treasury Accountant only by way of promotion.

(iv) Government Order dated 30.04.1993 was issued to mitigate the hardship and the situation of impossibility created on account of the restructuring of the cadre in order to implement the recommendations of the Pay Committee.

(v) Government of U.P. proceeded to make direct recruitment on the post of Assistant Treasury Accountant on the strength of relaxation made and the alterations effected vide Government Orders dated 20.11.1987, 21.03.1990 and 30.04.1993 to the U.P. Treasuries Ministerial Establishment.

(vi) Pursuant to requisition made by State Government, the Commission issued an advertisement dated 18.05.2015 inter-alia notifying 304 permanent posts of Assistant Treasury Accountants in the Pay Scale of Rs.5200-20200/- with Grade Pay of Rs.2800/- belonging to the Department of Director, Treasury, U.P. Lucknow for direct selection.

(vii) Bunch of writ petitions (Writ Petition Nos.2346 (SS) of 2016, 5254 (SS) of 2016, 6085 (SS) of 2016, 6095 (SS) of 2016, 6118 (SS) of 2016, 8642 (SS) of 2016 & 5287 (SS) of 2016) were filed by persons working as Junior Clerk for quashing the advertisement dated 18.05.2015 issued by the Commission, and further for mandamus not to fill up three posts of Assistant Treasury Accountants by way of direct recruitment until petitioners' candidature be not considered for promotion according to 1978 Rules.

(viii) During pendency of above-said bunch of writ petitions, the Commission completed the selection process pursuant to advertisement dated 18.08.2015 and after declaration of the result sent a list of selectees for the post of Assistant Treasury Accountants to the State Government and the State Government issued appointment letters. This bunch of writ petitions came up for hearing and vide judgment and order dated 21.08.2017, the co-ordinate Bench of this Court while finally deciding the writ petitions held that though the posts in District Treasuries as mentioned in 1978 Rules were re-designated but the mode of recruitment as contemplated under 1978 Rules framed under Article 309 of the Constitution of India was not changed either by amending 1978 Rules or by making fresh set of Rules. The Rules cannot be substituted by Government Orders and therefore, the Government Order dated 28.11.2011 providing for direct selection was not lawful. Vide judgment and order dated 21.08.2017, the Court did not interfere with the selection made pursuant to the advertisement dated 18.08.2015 and directed that the appointment of selectees was not interfered with but, as certain number of posts were directed to be kept reserved for the writ petitioners vide interim orders passed in those writ petitions subject to the final decision in the writ petitions, directed the State Government to consider the claim of the writ petitioners for promotion on the post of Senior Clerk/Assistant Treasury Accountant Grade-I/Assistant Treasury Accountant in accordance with 1978 Rules.

4. Facts of the present case(s) are as under:-

(i) A requisition dated 23.06.2016 was sent to the Commission by Director, Department of Treasury, U.P. i.e. Head of the Treasury Department, referring 540 vacant posts of Assistant Treasury Accountant for direct selection. This requisition made a specific mention that the selection was to be made by the respondent/Commission for the post of Assistant Treasury Accountant pursuant to the requisition dated 18.08.2015 and in accordance with the U.P. Direct Recruitment to Group "C' Posts (Mode and Procedure) Rules, 2015 (hereinafter referred to "2015 Rules').

(ii) On 05.07.2016, the Commission issued an advertisement for 702 posts of Assistant Treasury Accountant as part of the Combined Assistant Accountant and Auditors (General Selection) Competitive Exam, 2016. Thereafter, on 27.10.2016, the Commission issued a corrigendum notifying that selection would be made against 540 posts of Assistant Treasury Accountant in view of amendment made to the requisition by the State Government.

(iii) On 29.10.2016, the Commission declared the result of written examination wherein the petitioners were declared qualified.

(iv) Vide judgment and order dated 21.08.2017 rendered in Writ Petition No.2346 (SS) of 2016 (supra) wherein Advertisement dated 18.08.2015 was challenged, the coordinate Bench of this Court refused to quash the selection and appointment of the selected candidates but directed that the petitioners therein be considered for promotion in accordance with 1978 Rules.

(v) On the writ petitions falling in Category - I, the coordinate Bench of this Court passed interim order(s) providing that till the date of listing, the selection shall continue but the result of the same shall not be declared.

(vi) After passing the interim order in the writ petitions falling in Category - I, the Commission sent a letter dated 12.03.2019 addressed to the State Government intimating about the said interim order. In furtherance of the said letter, the State Government sent a letter dated 25.07.2019 addressed to the Secretary, U.P. Subordinate Service Selection Commission and to Director, Treasury, U.P., Lucknow withdrawing the requisition dated 23.06.2016 and advertisement dated 05.07.2016 of 540 posts of Assistant Treasury Accountants and required the commission and the Director to cancel the selection process pursuant to the said requisition and intimate the State Government accordingly.

(vii) Thereafter, bunch of writ petitions have also been filed (Category - II) for quashing the order dated 25.07.2019 vide which the requisition and advertisement was cancelled. Another set of writ petitions, which fall in the Category - III of the petitions, have been filed praying for a direction to be issued to the respondents to declare the result of the selection held by the Commission for the post of Assistant Treasury Accountant pursuant to advertisement dated 05.07.2016.

5. For proper adjudication of Category - I of cases, Writ Petition No.3522 (SS) of 2018 titled "Anoop Singh v. State of U.P. & Ors.' is being taken up.

6. Shri Ranvijay Singh, Advocate has advanced arguments on behalf of the petitioners who fall in Category - I of the writ petitions.

Shri Ramesh Kumar Singh, learned Senior Advocate/Additional Advocate General assisted by Shri Pankaj Khare, learned Additional Chief Standing Counsel and Shri Tushar Verma, Brief Holder, have appeared for the State, and Shri Gaurav Mehrotra, Advocate for U.P. Subordinate Service Selection Commission.

7. Learned counsel for the petitioners has submitted that the disputed questions of the bunch of the writ petitions in which Advertisement dated 05.07.2016 has been challenged have already been resolved in W.P. No.2346 (SS) of 2016 titled "*Indra Kumar Shrotria and Ors. v. State of U.P. & Ors.*" vide judgment and order dated 21.08.2017 and the Special Appeal filed against the said order bearing Special Appeal Defective No.343 of 2019 titled "Ravindra Kumar Pal v. State of U.P. & Ors." has already been dismissed vide order dated 23.10.2019.

8. It is submitted that Rule - 5 of 1978 Rules provides that 90% quota of the post of routine Grade Clerk shall be filled up from direct recruitment and remaining 10% by way of promotion from Class - IVth cadre. The said rule also provides that feeding cadre of Senior Grade Clerk shall be filled up by promotion from Routine Grade Clerk. It is also submitted that Rule 16 (1) of the 1978 Rules provides "the recruitment by promotion on the post of Senior Grade Clerk shall be made on the basis of seniority subject to rejection of the unfit through Selection Committee." The Selection Committee for promotion from Routine grade Clerk to the post of Senior Grade Clerk constituted as follows:

(i) District Officer.

(ii) Treasury Officer.

(iii) The Officer not below the rank of Deputy Collector nominated by District Officer.

According to Rule - 3 of the 1978 Rules, Appointing Authority for the post of Routine Grade Clerk & Senior Grade Clerk shall be District Officer.

9. Learned counsel has submitted that the name and designation of Routine Grade Clerk of Treasury Department has been re-designated as Junior Clerk and subsequently vide G.O. dated 20.11.1987, the name of Junior Clerk has been re-designated again as Assistant Treasury Accountant Grade - II and Senior Grade Clerk has been re-designated as Assistant Treasury Accountant Grade - I and the post of Assistant Accountant Grade - II was declared the post to be filled by direct recruitment. It is also submitted that the Senior Grade Clerk/Assistant Accountant Grade-I was not declared the post of direct recruitment by G.O. dated 20.11.1987 or by G.O. dated 21.03.1990.

10. It is submitted that vide G.O. dated 21.03.1990, the post of Assistant Accountant Grade - II has been upgraded from Rs.980-1500/- to Pay Scale of Rs.1200-2040/- and has been merged with Assistant Accountant Grade - I with combined designation as Assistant Treasury Accountant but the post of Assistant Treasury Accountant was not declared the post of direct recruitment vide G.O. dated 21.03.1990. It is submitted that vide G.O. dated 21.03.1990, 72 posts of the Assistant Accountant Grade - II Pay Scale Rs.980 - 1500/-, who were doing the routine work of the Department, has been identified as Junior Clerk and the said post has been declared to be filled by direct recruitment. In light of the Rule 5 & 16 (1) of 1978 Rules and G.Os. dated 20.11.1987

& 21.03.1990, the post of Senior Grade Clerk/Assistant Treasury Accountant Grade - I/Assistant Treasury Accountant was the post of promotion quota and Routine Grade Clerk /Junior Clerk /Junior Assistant /Assistant Treasury Accountant Grade - II was the post of direct recruitment (10% promotion quota from Class - IVth employee). It is submitted that for promotion on the post of Senior Grade Clerk/Assistant Treasury Accountant, no specific eligibility was required and the promotion was to be made on the basis of seniority from District Cadre subject to the rejection of unfit candidates.

11. Learned counsel has submitted that all the petitioners were eligible for promotion from Junior Clerk to next higher post according to 1978 Rules when U.P. Treasury Accounts (Non Gazetted) Service Rules, 2019 (hereinafter referred as "2019 Rules') took place. It is submitted that at present 38 Assistant Treasury Accountants, who were promoted from Junior Clerk, are working against 4% promotion quota. The 4% promotion quota of Assistant Treasury Accountants has already been filled and 4% promotion quota for Assistant Treasury Accountant was given only to harass the petitioners. By 1978 Rules, the post of Senior Grade Clerk re-designated as Assistant Treasury Accountant was required to be filled up only by promotion from cadre of Routine Grade Clerk re-designated as Junior Clerk. The 2019 Rules has not been given override effect on 1978 Rules, therefore, 1978 Rules still survives and protect the right of petitioners.

12. It is submitted on behalf of the petitioners that neither State Government nor the candidates has preferred any SLP before the Hon'ble Supreme Court against the order of Division Bench dated 23.10.2019 rendered in Special Appeal Defective No.343 of 2019 (supra) and 19.12.2019 rendered in Special Appeal Defective No.592 of 2019 vide which order dated 24.07.2019 rendered in Writ Petition No.14762 (SS) of 2019 was challenged. Vide order dated 24.07.2019, the petitioner in that case was allowed to work on the post of Treasury Accountant.

13. Learned counsel for the petitioners has submitted that the impugned advertisement dated 05.07.2016 was issued for recruitment on the post of Assistant Treasury Accountant in the light of 1978 Rules and also in light of various Government Orders. Meaning thereby that the post in question was vacant but the petitioners were not promoted inspite of the fact that 1978 Rules provides so.

14. It is submitted that by the impugned advertisement, direct recruitment cannot be made on the post of Assistant Treasury Accountant when 72 Junior Clerks of the entire U.P. are waiting for their promotion on the said post. It is vehemently argued that only the nomenclature of the post of Junior Clerk and Senior Clerk have been changed to Assistant Treasury Accountant but the same has not been incorporated in 1978 Rules and till date the respondents have failed to make new service rule for Assistant Treasury Accountant. It is submitted that the petitioners are possessing all the eligibility for promotion on the post of Assistant Treasury Accountant according to the statute applicable in their case.

15. Learned counsel has relied upon Para - 9 of the judgment rendered by Hon'ble Supreme Court in the case of ***Y.V. Rangaiah v. J. Sreenivasa Rao***1, which reads as under:-

"9. Having heard the counsel for the parties, we find no force in either of the two

contentions. Under the old rules a panel had to be prepared every year in September. Accordingly, a panel should have been prepared in the year 1976 and transfer or promotion to the post of Sub-Registrar Grade II should have been made out of that panel. In that event the petitioners in the two representation petitions who ranked higher than Respondents 3 to 15 would not have been deprived of their right of being considered for promotion. The vacancies which occurred prior to the amended rules would be governed by the old rules and not by the amended rules. It is admitted by counsel for both the parties that henceforth promotion to the post of Sub-Registrar Grade II will be according to the new rules on the zonal basis and not on the State-wide basis and, therefore, there was no question of challenging the new rules. But the question is of filling the vacancies that occurred prior to the amended rules. We have not the slightest doubt that the posts which fell vacant prior to the amended rules would be governed by the old rules and not by the new rules."

16. In such circumstances, learned counsel for the petitioners has submitted that the impugned advertisement dated 05.07.2016 for direct recruitment against the post in question is illegal, arbitrary, contrary to the 1978 Rules and deserves to be quashed with direction to promote the petitioners on the post in question.

17. Shri Ramesh Kumar Singh, learned Senior Advocate/Additional Advocate General appearing for the State has submitted that the petitioners of Category - I of the writ petitions have challenged Advertisement dated 05.07.2016 on the ground that the post of Assistant Treasury Accountant are promotional post and not the post to be filled by way of direct recruitment, and further relief has been sought for considering the petitioners for promotion on the post of Assistant Treasury Accountant in accordance with 1978 Rules.

18. Shri Singh has submitted that all the petitioners are Group "C' employees of the State Treasuries. In the State of U.P., the Group "C' employees are governed by 1978 Rules. It is submitted that nomenclature and pay scale etc., have been changed on several occasions till 1987. Rule 5 of 1978 Rules deals with the recruitment of the ministerial cadre of Group 'C' which consists of the following posts:-

(a) Routine Grade Clerk - By direct recruitment (90%) and remaining 10% by promotion from amongst Group 'D' employees of the Treasuries of the concerned District(s)

(b) Senior Grade Clerk - By promotion from amongst permanent Routine Grade clerks in the Treasury of the concerned district(s)

(c) Assistant Treasury Head Clerk - By promotion from amongst permanent Senior Grade Clerks in the Treasury(s) of the concerned district(s)

(d) Additional Treasury Head Clerk/ Treasury Head Clerk - By promotion from amongst permanent Assistant Treasury Head Clerks, permanent Senior Grade Clerks and permanent Routine Grade Clerks, who have put in a minimum of 12 years continuous service as Routine Grade Clerks working in the Treasury of the concerned division.

Rule 8 of 1978 Rules provides the academic qualifications for direct recruitment on the post of Routine Grade Clerk which shall be as prescribed in the

Subordinate Offices Ministerial Staff (Direct Recruitment) Rules, 1975 (Intermediate or equivalent Examination).

19. It is submitted that vide government order dated 21.3.1990 the post of Assistant Treasury Accountant Grade - I was merged with Assistant Treasury Accountant Grade - II (pay scale 1200/- - 2040/-) (Total posts 788 out of which 72 posts were left out for Junior Clerks in pay-scale of 950 -1500/-) and post of Assistant Treasury Accountant was created. These changes could not be incorporated in the 1978 Rules as a result of which time to time several Government Orders were issued setting up the criteria and other conditions of service in respect of the post in question i.e. Assistant Treasury Accountant.

20. Shri Singh has further submitted that an advertisement was issued in the year 2015 for the recruitment to the post of Assistant Treasury Accountant, which was challenged in the case of Indra Kumar Shrotria (supra) and the same was finally decided on 21.08.2017 wherein the Hon'ble Court on the basis of records was pleased to observe in Para - 3 as under:-

"3..... The qualification as well as the other conditions of service have all been provided for in the Rules of 1978. It is admitted to the parties that these rules have not undergone any amendment/change".

21. Shri Singh has invited attention of the Court in Paras - 7 & 10 of judgment in the case of Indra Kumar Shrotria (supra) in which the following has been observed:-

"7. It is settled that in the hierarchy of laws, a rule framed by the State, exercising its power under proviso to Article 309, would stand on a higher footing then a government order/executive instructions issued by the State and to the extent of repugnancy it would be the statutory rule, which would prevail over the government order. In case the post of Senior Clerk, which has been re-designated as Assistant Treasury Accountant, is tried to be filled by way of direct recruitment, the avenues of promotion, which are available to Routine Grade Clerk under the Rules of 1978, would be taken away.

10. The rules as it exists on date have to be enforced and to the extent the executive instructions/govt. orders are inconsistent with it, the instructions/govt. orders must bend before the rules. The petitioners in this bunch of petitions are admittedly appointed and are working as Routine Grade Clerk, and by virtue of government order issued in the year 1987 and 1990, are re-designated as Assistant Treasury Accountant Grade II. They are entitled to be considered for promotion to the post of Senior Clerk, which post stands re-designated as Assistant Treasury Accountant Grade I....."

22. It is submitted by Shri Singh that in pursuance of the aforesaid judgement and order dated 21.08.2017 and further in pursuance of various interim orders passed in different writ petitions in the present bunch of writ petitions, the State Government while considering the illegalities, difficulties and anomalies etc., in the initiation of the recruitment being done in pursuance of the advertisement dated 05.07.2016 for the post of Assistant Treasury Accountant not only decided to cancel/withdraw the requisition dated 23.06.2016 and advertisement dated 05.07.2016 but also decided to frame fresh rules governing the services of the group

"C" employees of the State Treasuries, which also covers the post of Assistant Treasury Accountant, and providing promotional avenue to the Junior Clerks. In view of the aforesaid not only the impugned order dated 25.07.2019 cancelling the requisition dated 23.06.2016 for recruitment to the 540 post of Assistant Treasury Accountant has been passed but also the 2019 Rules has been promulgated which has been notified on 02.01.2020. Therefore, now any recruitment to the posts of Assistant Treasury Accountant can only be made in accordance with the 2019 Rules and not otherwise.

23. Shri Singh has submitted that Rule 5 of 1978 Rules deals with recruitment on various posts. After issuance of government order dated 21.03.1990, the post of Assistant Treasury Accountant Grade - I and Assistant Treasury Accountant Grade - II (earlier known as Routine Grade Clerk and Junior Clerk) have been merged and re-designated as Assistant Treasury Accountant, thus, now the post of Junior Clerk or Routine Grade Clerk became the post of direct recruitment. It is further submitted the petitioners have not completed 12 years of service, therefore, they cannot claim for promotion on the post of Assistant Treasury Accountant in pursuance of 1978 Rules.

24. It is also submitted that vide 2019 Rules not only 4% quota in the post of Assistant Treasury Accountant has been given to the Junior Clerks but the qualifications for the purposes of promotion to the 4% quota of Assistant Treasury Accountant has also been changed. Shri Singh has submitted that out of the strength of 939 posts of Assistant Treasury Accountant, 4% promotional quota (i.e. 38 posts) have been given to the Junior Clerks working in the Treasuries of the State of U.P. and on the aforesaid 38 posts, the incumbents senior to the petitioners have been given promotions and now no post under the promotional quota is vacant. It is further submitted that as per Rule 5(1)(ii) of 2019 Rules, a candidate must have rendered five years of service as Junior Assistant of Treasuries and have passed departmental examination on the first day of the year of recruitment to be eligible for promotion under 4% promotional quota on the post of Assistant Treasury Accountant.

25. Shri Singh has invited attention of the Court towards Para - 13 of the Supplementary Counter Affidavit dated 21.01.2021 and submitted that in pursuance of the aforesaid cadre determination and as per Service 2019 Rules, vide office order dated 08.06.2020, following persons who were petitioners in following writ petitions were promoted:

क०सं०	रिट याचिका संख्या	याची का नाम
1	3611/ एसएस / 2018	राज कुमार
2	3527/ एसएस/ 2018	संदीप कुमार श्रीवास्तव
3	15229 / एसएस / 2018	श्रीमती नीलम वर्मा
4	3524 / एसएस / 2018	कामिनी साहू
5	4975 / एसएस / 2018	सौरभ गोयल
6	4932 / एसएस / 2018	गोबिन्द बहादुर श्रीवास्तव
7	3523 / एसएस /	सूरज कुमार

	2018	
8	11256/एसएस/2018	रोहित बाजपेई
9	5090 / एसएस / 2018	राजेन्द्र प्रसाद
10	5117 / एसएस / 2018	राजकमल मिश्र

26. Summing up his arguments in a nutshell Shri Singh has lastly submitted that those petitioners who are seeking promotions to the post of Assistant Treasury Accountant and have not passed the departmental examination, which is a necessary qualification in pursuance of Rule 5(1)(ii) of 2019 Rules, are not eligible to be promoted on the aforesaid post either in pursuance of 1978 Rules or 2019 Rules.

27. For proper adjudication of Category - II of cases, Writ Petition No.24163 (SS) of 2019 titled "Pankaj Singh & Ors. v. State of U.P. & Ors.' is being taken up.

28. Shri L.P. Mishra, Advocate alongwith Shri Apporva Tiwari, Advocate has advanced arguments on behalf of the petitioners who fall in Category - II of the writ petitions.

Shri Ramesh Kumar Singh, learned Senior Advocate/Additional Advocate General assisted by Shri Pankaj Khare, learned Additional Chief Standing Counsel and Sri Tushar Verma, Brief Holder, have appeared for the State, and Shri Gaurav Mehrotra, Advocate for U.P. Subordinate Service Selection Commission.

29. It is submitted by Shri Apporva Tiwari that there were four category of posts under 1978 Rules i.e. (1) Routine Grade Clerk "Junior Clerk" direct recruitment (2) Senior Grade Clerk "by promotion" (3) Assistant Treasury Head Clerk "by way of promotion" (4) Additional Treasury Head Clerk/Treasury Head Clerk. Thereafter, a Government Order dated 20.11.1987 was issued and the name of the Junior Clerk has been re-designated as Assistant Treasury Accountant Grade-II in the Pay Scale 354-550, the name of the Senior Clerk has been re-designated as Assistant Treasury Accountant Grade-I in the Pay Scale of Rs.430-685 and the name of the Head Treasury Clerk has been re-named as Assistant Treasury Officer in the Pay Scale of Rs.625-1360.

30. It is submitted that State Government vide Government Order dated 20.11.1987 created post of Assistant Treasury Accountant Grade-I and Assistant Treasury Accountant Garde-II. Subsequently, vide Government Order dated 21.03.1990 abolished the post of Assistant Treasury Accountant Grade-I and Assistant Treasury Accountant Grade-II and by merging the said two posts created the post of Assistant Treasury Accountant. The State Government decided to keep 716 posts of Assistant Treasury Accountant intact out of 788 posts of Junior Clerk and the remaining 72 posts were kept as it is in the name of Junior Clerk.

31. It is submitted that on 30.04.1993, a letter was sent by the Joint Secretary of State of U.P. to Director, Treasury, U.P., Lucknow for recruitment of Assistant Treasury Accountant through direct recruitment. It is also submitted that 72 posts of Junior Clerk, which has not been re-designated as Assistant Treasury Accountant, can be promoted to the post of Senior Grade Clerk in view of the U.P. Government Department Ministerial Cadre Service Rules, 2014 (hereinafter referred to

as "2014 Rules'). The 2014 Rules has been enacted under Article 309 of Constitution of India wherein it is specifically provided that 80% posts of Junior Clerk would be filled up by direct recruitment while 15% post of Junior Clerk would be filled up by promotion from the employees working on Group-D posts who have passed the High School Examination and remaining 5% would be filled up by promotion from the employees working on Group-D posts who have passed the Intermediate Examination. It is further provided that promotion of Junior Clerk to the post of Senior Grade Clerk would be made through Selection Committee amongst the Junior Clerk who have completed 5 years of service. It is vehemently argued that Junior Assistant/Junior Clerk can never claim promotion to the post of Assistant Treasury Accountant.

32. Shri Tiwari has submitted that appointment and promotion of Junior Clerk working in the Treasury of State of U.P. are governed under 2014 Rules after creation of their separate cadre vide Government Order dated 21.03.1990. It is further submitted that in view of the re-designing of structure of the cadre of Assistant Treasury Accountant and creation of separate cadre of Junior Clerk vide Government Order dated 21.03.1990 and earlier Government Order dated 21.11.1987, the 1978 Rules became ineffective and inoperative in the matter of selection of Assistant Treasury Accountant.

33. It is vehemently argued that Advertisement dated 18.08.2015 was issued by the Commission vide Advertisement No.11-Exam/2015 for appointment of Assistant Accountant, Auditor and Assistant Treasury Accountant. The same was challenged before this Court in *Indra Kumar Shrotria' case (supra).* Shri Tiwari has submitted that selection of Assistant Accountant, Auditor and Assistant Treasury Accountant in the aforesaid advertisement were completed by 2015 Rules and 297 Assistant Treasury Accountant were selected and 8 posts of Assistant Treasury Accountant were kept pending/reserved in compliance of order of the Court passed in that case. The *Indra Kumar Shrotria's case (supra)* was finally decided on 21.08.2017.

34. Shri Tiwari has further submitted that the Commission advertised 1901 posts for Assistant Accountant, 255 posts of Auditor and 702 posts of Assistant Treasury Accountant vide Advertisement No.12-Examination/2016 dated 05.07.2016 under 2015 Rules. In pursuance of the said advertisement, written examination was held on 11.09.2016 and the petitioners, who fall in Category - II of the writ petitions, alongwith several other candidates were declared successful on 29.10.2016. The date of interview was fixed from 23.02.2017 to 21.05.2017 but the Government imposed ban on recruitment initiated by the Commission due to which entire selection process was stopped. After some time, the ban was lifted and the recruitment process started after completion of vigilance enquiry.

35. Shri Tiwari has further submitted that Director, Treasury, U.P., Lucknow vide Letter No.2029/21(287) dated 03.10.2016 addressed to the Commission requested therein to make recruitment for only 540 posts of Assistant Treasury Accountant in place of 702 posts. Thereafter, the Commission issued a corrigendum/notice dated 27.10.2016 and the post of Assistant Treasury Account was reduced to 540 from 702.

36. It is submitted that second time the date of interview was declared by the respondents and as such the petitioners of Category - II of the writ petitions and several other persons duly participated in the interview held from 28.08.2018 to 10.12.2018 at premises of the Commission but the result has not been declared yet.

37. Shri Tiwari has submitted that the impugned order dated 25.07.2019 was passed by Special Secretary, Department of Finance, Civil Secretariat, Government of U.P., Lucknow vide which the selection process of Assistant Treasury Accountant has been cancelled. It is further submitted that the impugned order dated 25.07.2019 is admittedly an executive order which leads to adverse civil consequences against the petitioners inasmuch as the petitioners had qualified in the written examination, which has been cancelled. It is further submitted that the impugned order has been passed without assigning any reason and the counter affidavit filed by the State is also silent on that point.

38. Shri Tiwari has submitted that candidates who apply, and undergo written or viva voce test acquire vested right for being considered for selection in accordance with the terms and conditions contained in the advertisement. He has relied upon Para - 11 of the judgment rendered by Hon'ble Supreme Court in the case of ***N.T. Devin Katti & Ors. v. Karnataka Public Service Commission & Ors***.2, which reads as under:-

"11. There is yet another aspect of the question. Where advertisement is issued inviting applications for direct recruitment to a category of posts, and the advertisement expressly states that selection shall be made in accordance with the existing rules or government orders, and if it further indicates the extent of reservations in favour of various categories, the selection of candidates in such a case must be made in accordance with the then existing rules and government orders. Candidates who apply, and undergo written or viva voce test acquire vested right for being considered for selection in accordance with the terms and conditions contained in the advertisement, unless the advertisement itself indicates a contrary intention. Generally, a candidate has right to be considered in accordance with the terms and conditions set out in the advertisement as his right crystallises on the date of publication of advertisement, however he has no absolute right in the matter. If the recruitment Rules are amended retrospectively during the pendency of selection, in that event selection must be held in accordance with the amended Rules. Whether the Rules have retrospective effect or not, primarily depends upon the language of the Rules and its construction to ascertain the legislative intent. The legislative intent is ascertained either by express provision or by necessary implication; if the amended Rules are not retrospective in nature the selection must be regulated in accordance with the rules and orders which were in force on the date of advertisement. Determination of this question largely depends on the facts of each case having regard to the terms and conditions set out in the advertisement and the relevant rules and orders. Lest there be any confusion, we would like to make it clear that a candidate on making application for a post pursuant to an advertisement does not acquire any vested right of selection, but if he is eligible and is otherwise qualified in accordance with the relevant rules and the terms contained in the advertisement, he does

acquire a vested right of being considered for selection is accordance with the rules as they existed on the date of advertisement. He cannot be deprived of that limited right on the amendment of rules during the pendency of selection unless the amended rules are retrospective in nature."

39. Shri Tiwari has also relied upon Para - 13 of the judgment rendered by Hon'ble Supreme Court in the case of ***Commissioner of Police v. Gordhandas Bhanji***3, relevant portion of which reads as under:-

"13. .....public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself."

40. The aforesaid principle was expanded by the Hon'ble Supreme Court in Para - 8 of the judgment rendered in the case of ***Mohinder Singh Gill & Anr. v. Chief Election Commissioner & Ors.***4 on which Shri Tiwari has relied. Para - 8 is reproduced hereinbelow:-

"8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out."

41. Shri Tiwari has relied upon Paras - 23 & 24 of the judgment rendered by Hon'ble Supreme Court in the case of ***East Coast Railway & Anr. v. Mahadev Appa Rao & Ors.***5 and submitted that an order cancelling a recruitment without assigning any reason suffers from the vice of non-application of mind and is an arbitrary exercise of power which is capable of being judicially reviewed. Paras - 23 & 24 read as under:-

"23. Arbitrariness in the making of an order by an authority can manifest itself in different forms. Non-application of mind by the authority making the order is only one of them. Every order passed by a public authority must disclose due and proper application of mind by the person making the order. This may be evident from the order itself or the record contemporaneously maintained. Application of mind is best demonstrated by disclosure of mind by the authority making the order. And disclosure is best done by recording the reasons that led the authority to pass the order in question. Absence of reasons either in the order passed by the authority or in the record contemporaneously maintained is clearly suggestive of the order being arbitrary hence legally unsustainable.

24. In the instant case the order passed by the competent authority does not state any reasons whatsoever for the cancellation of the typing test. It is nobody's case that any such reasons were set out even in any contemporaneous record or file. In the absence of reasons in support of the order it is difficult to assume

that the authority had properly applied its mind before passing the order cancelling the test."

42. Shri Tiwari has relied upon the judgments rendered by Hon'ble Supreme Court in the cases of ***P. Mahendran & Ors. v. State of Karnataka & Ors.6, Mohd. Raisul Islam & Ors. v Gokil Mohan Hazarika & Ors.7 & B.L. Gupta & Anr V. M.C.D***.8 and submitted that right to selection and appointment cannot be defeated by subsequent amendment of rules.

43. Shri Tiwari has also relied upon Paras - 5 & 6 of the judgment rendered by Hon'ble Supreme Court in the case of ***J.C. Yadav & Ors. v. State of Haryana & Ors***.9 and submitted that Government can relax the rules in respect of a class to appoint requisite qualified persons to mitigate the undue hardship. Paras - 5 & 6 read as under:-

"5. The sole question for consideration is whether the relaxation granted by the State Government in favour of the appellants is valid. Rule 22 which confers power on the government to relax requirement of rules, is as under:"

*"22. Power to relax.-- * * *

Where government is satisfied that the operation of any of these rules causes undue hardship to any particular case, it may by order dispense with or relax the requirements of that rule to such extent, and subject to such conditions, as it may consider necessary for dealing with the case in a just and equitable manner.*

** * *"*

"6. The rule confers power on the government to dispense with or to relax the requirement of any of the rules to the extent and with such conditions as it may consider necessary for dealing with the case in a just and equitable manner. The object and purpose of conferring this power on the government is to mitigate undue hardship in any particular case, and to deal with a case in a just and equitable manner. If the rules cause undue hardship or rules operate in an inequitable manner in that event the State Government has power to dispense with or to relax the requirement of rules. The rule does not restrict the exercise of power to individual cases. The government may in certain circumstances relax the requirement of rules to meet a particular situation. The expression "in any particular case" does not mean that the relaxation should be confined only to an individual case. One of the meanings of the expression "particular" means "peculiar or pertaining to a specified person -- thing -- time or place -- not common or general". The meaning of the word particular in relation to law means separate or special, limited or specific. The word ''case' in ordinary usage means ''event', ''happening', ''situation', ''circumstances'. The expression ''case' in legal sense means ''a case', ''suit' or ''proceeding in court or Tribunal'. Having regard to these meanings the expression ''in any particular case' would mean: in a particular or pertaining to an event, situation or circumstances. Rule 22 postulates relaxation of rules to meet a particular event or situation, if the operation of the rules causes hardship. The relaxation of the rules may be to the extent the State Government may consider necessary for dealing with a particular situation in a just and equitable manner. The scope of rule is wide enough to confer power on the State Government to relax the requirement of rules in respect of an individual or class of individuals to the extent it may consider necessary for dealing with the case in a just and

equitable manner. The power of relaxation is generally contained in the Rules with a view to mitigate undue hardship or to meet a particular situation. Many a time strict application of service rules create a situation where a particular individual or a set of individuals may suffer undue hardship and further there may be a situation where requisite qualified persons may not be available for appointment to the service. In such a situation the government has power to relax requirement of rules. The State Government may in exercise of its powers issue a general order relaxing any particular rule with a view to avail the services of requisite officers. The relaxation even if granted in a general manner would ensure to the benefit of individual officers."

44. It is submitted that judgment dated 21.08.2017 passed in *Indra Kumar Shrotria's case (supra)* has not considered Rule 4 and Rule 26 of the 1978 Rules, which are clear repositories of power for issuance of government orders dated 20.11.1987 and 21.03.1990. Furthermore, the said judgment has not quashed the selection made in the year 2015, thus it cannot be referred to as a binding precedent for any proposition.

45. It is further submitted that the question as to whether the 1978 Rules as supplemented by Government Orders dated 20.11.1987 and 21.03.1990 permit direct recruitment on the post of Assistant Treasury Accountant is a pure question of law and in view of the decision of the Hon'ble Supreme Court in ***Satyendra Kumar & Ors. v Rajnath Dubey & Ors***.10, the said question is to be independently determined by this Hon'ble Court and no res-judicata can be claimed in that regard. Therefore, judgment dated 21.08.2017 passed in Indra Kumar Shrotria's case (supra) is inconsequential.

46. By relying on Para - 43 of the judgment rendered by Hon'ble Supreme Court in the case of ***Smt. Swaran Lata v. Union of India & Ors***.11, Shri Tiwari has submitted that executive power under Article 162 of Constitution of India is coextensive with the legislative power to regulate recruitment. Para - 43 reads as under:-

"43. It is not obligatory under the proviso to Article 309 to make rules of recruitment etc. before a service can be constituted, or a post created or filled. The State Government has executive power in relation to all matters in respect to which the legislature of the State has power to make laws. It follows from this that the State Government will have executive powers in respect of List II, Entry 41 of the Seventh Schedule: "state Public Services": B.N. Nagarajan v. State of Mysore [(1966) 3 SCR 382 : AIR 1966 SC 1942 : (1967) 1 LLJ 698] . There is nothing in the terms of Article 309 of the Constitution which abridges the power of the Executive to act under Article 162 of the Constitution without a law. The same view has been taken by this Court in T. Cajee v. U. Jormanik Siem [(1961) 1 SCR 750 : AIR 1961 SC 276 : (1961) 1 LLJ 652] and Sant Ram Sharma v. State of Rajasthan [(1968) 1 SCR 111 : AIR 1967 SC 1910 : (1968) 2 LLJ 830] . The same principle underlies Article 73 of the Constitution in relation to the executive power of the Union."

47. Lastly, Shri Tiwari has relied on Para - 7 of the judgment rendered by Hon'ble Supreme Court in the case of ***Sant Ram Sharma v. State of Rajasthan &***

Ors.12 and submitted that if the rules are silent on any particular point, the government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed.

48. Shri Ramesh Kumar Singh, learned Senior Advocate/Additional Advocate General assisted by Shri Pankaj Khare, learned Additional Chief Standing Counsel and Sri Tushar Verma, Brief Holder, have appeared for the State has vehemently opposed the submissions advanced by Dr. L.P. Mishra and Shri Apporva Tiwari, Advocate and submitted that the writ petitions of this category (Category - II) have been filed challenging order dated 25.07.2019 by which requisition dated 23.06.2016 sent to the Commission for recruitment on 540 posts of Assistant Treasury Accountant and advertisement dated 05.07.2016 have been withdrawn/cancelled. It is submitted that the nomenclature and pay-scale etc., have changed on several occasions till 1987. In pursuance to the judgment dated 21.08.2017 rendered in Indra Kumar Shrotria (supra) and pursuant to various interim orders passed in different writ petitions in the present bunch of petitions, the State Government while considering the illegalities, difficulties and anomalies etc., in the initiation of the recruitment being done in pursuance of the Advertisement dated 05.07.2016 on the posts of Assistant Treasury Accountant not only decided to cancel the requisition dated 23.06.2016 and advertisement dated 05.07.2016 but also decided to frame fresh rules governing the services of Group "C' employees of the State Treasuries, which also covers the post of Assistant Treasury Accountant and providing promotional avenues to the Junior Clerks. In such circumstances, not only the impugned order dated 25.07.2019 cancelling requisition dated 23.06.2016 and advertisement dated 05.07.2016 has been passed but also the 2019 Rules has been promulgated, which has been notified on 02.01.2020. Thus, now any recruitment to the post of Assistant Treasury Accountant can only be made in accordance with 2019 Rules and not otherwise.

49. Shri Singh has further submitted that if it is assumed that the petitioners have been selected in the examination held in pursuance of Advertisment dated 05.07.2016, it does not give them indefeasible right of claiming appointment. The State Government has acted fairly in taking decision not to fill up the vacancies occurred vide Advertisement dated 05.07.2016 as the post was not advertised in accordance with 1978 Rules. If any selection would have been made on the aforesaid 540 posts of Assistant Treasury Accountant, it would only have been a futile exercise because since the issue had already been decided by the Hon'ble High Court vide judgment and order dated 21.08.2017 (supra) by recording a categorical finding that the earlier advertisement issued pursuant to the directions issued by the State Government contained in Government Order dated 20.08.2011 were not in conformity with the 1978 Rules, as such, the subsequent advertisement dated 05.07.2016 automatically becomes untenable in the eyes of law.

50. Shri Singh has relied upon relevant portion of Para - 7 of the judgment rendered by Hon'ble Supreme Court in the case of ***Shankarsan Dash v. Union of India***13, which reads as under:-

"7. It is not correct to say that if a number of vacancies are notified for appointment and adequate number of

candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies....."

51. Shri Singh has also relied upon Paras - 21, 22, 23 & 25 of the judgment rendered in the case of ***Lt. CDR. M. Ramesh v. Union of India & Ors***.14, which read as under:-

"21. The first issue that arises is whether the petitioners have any vested right to claim that the result must be declared and if the petitioners are selected, they should be appointed. This Court in Jai Singh Dalal v. State of Haryana ***[Jai Singh Dalal v. State of Haryana, 1993 Supp (2) SCC 600 : 1993 SCC (L&S) 846]*** *held that merely because the Government had sent a requisition to UPSC to select the candidates for appointments, did not create any vested right in the candidate called for the interview to be appointed. It was also held that the authority which has the power to specify the method of recruitment must be deemed to have the power to revise and substitute the same. The Court, however, also laid down that at best the Government may be required to justify its action on the touchstone of Article 14 of the Constitution. This view has been followed in a large number of cases. In* ***Vijay Kumar Mishra v. High Court of Patna [Vijay Kumar Mishra v. High Court of Patna, (2016) 9 SCC 313 : (2016) 2 SCC (L&S) 606]*** *, this Court held that there is a distinction between selection and appointment. It was held that a person, who is successful in the selection process, does not acquire any right to be appointed automatically. Such a person has no indefeasible right of appointment.*

22. It is, thus, well settled that merely because a person has been selected, does not give that person an indefeasible right of claiming appointment. As far as the present cases are concerned, results have not been declared and even the selection process is not complete. As such, there is no manner of doubt that the petitioners have no enforceable right to claim that the result should be declared or that they should be appointed if found meritorious.

23. Having held so, we must also note that the law is well settled that even though the candidates may not have a vested right of appointment and the State is not under any duty or obligation to fill up the vacancies, the State has to act fairly and it cannot act in an arbitrary manner. The decision, not to fill up the vacancies pursuant to the selection process, must be taken bona fide and for justifiable and appropriate reasons. In this regard, we may make reference to Shankarsan Dash v. Union of India [Shankarsan Dash v. Union of India, (1991) 3 SCC 47 : 1991 SCC (L&S) 800] .

25. The main attack against the decision of the Government is on the ground that the candidates had a legitimate expectation that pursuant to the written test and interview, their result would be declared and if found successful, they would be appointed. It is a well-settled law that even if there is no vested right, the principle of legitimate expectation can be invoked. Legitimate expectation arises when the citizens expect that they will be benefited under some policy or decision, announced by the State. At the same time, the law is well settled that the Legislature

and the Executive can change any policy for good reasons. These good reasons must be such which are not arbitrary, which are not mala fide and the decision has been taken in the public interest. If the decision to change the policy is arbitrary or capricious then it may be struck down."

52. Shri Singh has relied upon Para - 7 of judgment rendered by Hon'ble Supreme Court in the case of ***Jai Singh Dalal v. State of Haryana***15, relevant portion of which reads as under:

"7.....The stage at which the last-mentioned notification came to be issued was the stage when the HPSC was still in the process of selecting candidates for appointment by special recruitment. During the pendency of the present proceedings the State Government finalised the criteria for special recruitment by the notification of March 9, 1992. Thus, the HPSC was still in the process of selecting candidates and had yet not completed and finalised the select list nor had it forwarded the same to the State Government for implementation. The candidates, therefore, did not have any right to appointment. There was, therefore, no question of the High Court granting a mandamus or any other writ of the type sought by the appellants. The law in this behalf appears to be well settled. In the State of Haryana v. Subash Chander Marwaha [(1974) 3 SCC 220 : 1973 SCC (L&S) 488 : (1974) 1 SCR 165] this Court held that the mere fact that certain candidates were selected for appointment to vacancies pursuant to an advertisement did not confer any right to be appointed to the post in question to entitle the selectees to a writ of mandamus or any other writ compelling the authority to make the appointment....."

53. Summing up his arguments, Shri Singh has submitted that it can be said that the State Government while considering all the aforesaid facts and in public interest took a decision to cancel the requisition dated 23.06.2016 and advertisement dated 05.07.2016 and have also promulgated fresh service rules i.e. 2019 Rules by which not only 4% quota in the posts of Assistant Treasury Accountant has been given to the Junior Clerks but also the qualifications for the purposes of direct recruitment to the remaining 96% quota of Assistant Treasury Accountant has been changed. In view of the above, it would be appropriate to do the recruitment on the aforesaid posts afresh.

54. For the cases of Category - III, arguments advanced by Dr. L.P. Mishra and Shri Apporva Tiwari have been adopted as the said category of cases has been filed only for declaration of result held in pursuance of Advertisement dated 05.07.2016.

55. I have heard learned counsel for the parties of their respective petitions and perused the government orders, judgment as cited above as also the record.

56. The following are the issues involved in the instant case:-

"(I) Whether a Rule made under Article 309 of Constitution of India can be set at naught by executive fiat?

(II) Whether executive power under Article 162 of Constitution of India is coextensive with legislative power?

(III) Whether the petitioners of Category - II & III of the writ petitions have a vested right for selection in accordance with the terms of advertisement having successfully qualified the written examination?

57. For proper adjudication of the aforesaid issues, the impugned order dated 25.07.2019 vide which requisition dated 23.06.2016 and advertisement dated 05.07.2016 have been withdrawn/cancelled is reproduced herein below:-

संख्या–एस0–3–71/दस–2019/डब्लू(17)/18

प्रेषक

दया शंकर सिंह
विशेष सचिव,
उत्तर प्रदेश शासन।

सेवा में,

1. सचिव,
उ0प्र0 अधीनस्थ सेवा चयन आयोग
लखनऊ।

2. निदेशक,
कोषागार, उ0प्र0,
जवाहर भवन, लखनऊ।

वित्त (सेवायें) अनुभाग–3 लखनऊ : दिनांक 25 जुलाई 2019

विषय :– रिट याचिका संख्या– 3522 (एस0एस)/2018, अनूप सिंह बनाम उ0प्र0 राज्य व अन्य में पारित आदेश दिनांक 08.02.2018 एवं रिट याचिका संख्या– 11256 (एस0एस)/2018, रोहित बाजपेयी बनाम उ0प्र0 राज्य व अन्य में मा0 उच्च न्यायालय द्वारा पारित आदेश दिनांक 19.04.2018 के सम्बन्ध में।

महोदय,

कृपया उपर्युक्त विषयक आयोग के पत्र संख्या–1000/विधि अनुभाग/10/956/2018/2019, दिनांक 12.03.2019, का सन्दर्भ ग्रहण करने का कष्ट करें, जिसके द्वारा आयोग ने विषयांकित रिट याचिकाओं में मा0 उच्च न्यायालय द्वारा पारित आदेशों के क्रम में यह अवगत कराते हुए कि प्रकरण पर शासन का निर्णय प्राप्त न होने की स्थिति में मा0 उच्च न्यायालय द्वारा पारित स्थगन आदेश के कारण आयोग द्वारा सम्मिलित सहायक लेखाकार एवं लेखा परीक्षक (सामान्य चयन) परीक्षा, 2016 का अन्तिम चयन परिणाम घोषित नहीं किया जा सका है, यह अनुरोध किया है कि सन्दर्भित प्रकरण पर शासन द्वारा निर्णय लेते हुए निर्णय से आयोग को अवगत कराया जाय।

2– प्रकरण में सम्यक विचारोपरान्त सहायक कोषागार लेखाकार के 540 पदों के चयन हेतु दिनांक 05.07.2016 को उ0प्र0 अधीनस्थ सेवा चयन आयोग को प्रेषित अधियाचन वापस लिये जाने का निर्णय लिया गया है। अतएव इस सम्बन्ध में मुझे यह कहने का निदेश हुआ है कि कृपया इस अधियाचन से सम्बन्धित चयन प्रक्रिया को निरस्त किया जाय एवं कृत कार्यवाही से शासन को अवगत कराया जाय।

(दया शंकर सिंह)
विशेष सचिव

58. Rules 4, 5, 8 & 26 of 1978 Rules reads as under:-

*"**4. Cadre of service**. - (1) The strength of the service and of each category of posts therein shall be such as may be determined by the Governor 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) shall be as given in Appendix 'A':

Provided that-

(1) the appointing authority may leave unfilled or the Governor may hold in abeyance any vacant post, without thereby entitling any person to compensation,

(2) The Governor may create such additional, permanent or temporary posts from time to time as he may consider proper.

*5. **Source of Recruitment** - Recuritment to the various categories of posts in the service shall be made from the following sources:*

"(a) Routine Grade Clerk - By direct recruitment (90%) and remaining 10% by promotion from amongst Group 'D' employees of the Treasuries of the concerned District(s)

(b) Senior Grade Clerk - By promotion from amongst permanent Routine Grade clerks in the Treasury of the concerned district(s)

(c) Assistant Treasury Head Clerk - By promotion from amongst permanent Senior

Grade Clerks in the Treasury(s) of the concerned district(s)

(d) Additional Treasury Head Clerk/ Treasury Head Clerk - By promotion from amongst permanent Assistant Treasury Head Clerks, permanent Senior Grade Clerks and permanent Routine Grade Clerks, who have put in a minimum of 12 years continuous service as Routine Grade Clerks working in the Treasury of the concerned division.

Note- For the purpose of promotion, a combined seniority list shall be prepared by arranging the names of Assistant Treasury Head Clerks, Senior Grade Clerks and Routine Grade Clerks in the said order on the basis of the date of continuous service on the said post, so however, the inter se seniority of person in any category of post in any district shall not be disturbed."

8. ***Academic Qualification*** *- A candidate for direct recruitment to the post of Routine Grade Clerks must have the qualification as prescribed in the Subordinate Officers Ministerial Staff (Direct Recruitment) Rules, 1979.*

26. ***Relaxation from the conditions of service*** *- Where the State Government is satisfied that the operation of any rule regulating the conditions of service of persons appointed to the service causes undue hardship in any particular case, it may, notwithstanding anything contained in the rules applicable in the case, by order dispense with or relax the requirement to that rule to such extent and subject to such condtitions as it may consider necessary for dealing with the case in a just and equitable manner. "*

59. Government Order dated 20.11.1987 is reproduced hereinbelow:-

संख्याःएस–3–3856/दस–87–34(76)/(78)/टी0सी0–1

प्रेषक,
श्री वी0के0 सक्सेना,
प्रमुख सचिव, वित्त,
उत्तर प्रदेश शासन।

सेवा में,
निदेशक,
कोषागार निदेशालय,
उ0प्र0 जवाहर भवन,
लखनऊ।

वित्त(सेवायें) अनुभाग–3 लखनऊ : दिनाँक 20 नवम्बर, 1987

विषयः कोषागार कर्मचारियों के पदनामों का परिवर्तन।

महोदय,

उपर्युक्त विषय के सम्बन्ध में मुझे यह कहने का निदेश हुआ है कि तात्कालिक प्रभाव से राज्यपाल महोदय कोषागारों में निम्नलिखित तालिका के कालम–1 के पदनामों को कालम–3 में उल्लिखित पदनामों में परिवर्तित किये जाने की सहर्ष स्वीकृति प्रदान करते है :–

वर्तमान पदनाम	वेतनमान	परिवर्तित पदनाम
1	2	3
मुख्य लिपिक	625–1360	सहायक कोषागार अधिकारी
2 बिल पारण लिपिक/चेक राइटर	470–735	कोषागार लेखाकार
3 पेशन लिपिक/वरिष्ठ लिपिक/अभिलेखपाल/अधिष्ठान लिपिक इत्यादि।	430–685	सहायक कोषागार लेखाकार ग्रेड–1
4कनिष्ठ लिपिक/स्याहनवीस	354–550	सहायक कोषागार लेखाकार ग्रेड–2

2. उपर्युक्त पदनाम परिवर्तन के फलस्वरुप उनके वर्तमान वेतनमानों में कोई परिवर्तन नहीं होगा और न ही इस आधार पर किसी अन्य प्रकार का वित्तीय लाभ इन पदों के पदधारकों को अनुमन्य होगा।

3. मुझे यह भी कहना है कि कोषागारो में कार्यक्षमता/दक्षता बढ़ाने के उद्देश्य से भविष्य में सहायक कोषागार लेखाकार ग्रेड–2 के पदों पर सीधी भर्ती के लिये न्यूनतम शैक्षिक अर्हता किसी मान्यता प्राप्त विश्वविद्यालय से (गणित) अथवा कामर्स(एकाउन्टेन्सी) के साथ स्नातक उपाधि होगी। इस प्रसंग में नियमावली में आवश्यक संशोधन अलग से किये जायेगे।

भवदीय,

ह0/–
वी0के0 सक्सेना

प्रमुख सचिव।

60. Government Order dated 21.03.1990 is reproduced hereinbelow:-

संख्या– एस–3–900/दस–90–100(56अ)/89

प्रेषक,

श्री रमा शंकर चौधरी,
उप सचिव,
उ0प्र0 शासन।

सेवा में,

निदेशक,
कोषागार, उ0प्र0
लखनऊ।

वित्त(सेवायें) अनुभाग–3 लखनऊ : दिनाँक :: 21 मार्च, 1990

विषय :– समता समिति उ0प्र0 (1989) को संस्तुतियों पर लिये गये निर्णयानुसार कोषागार अधिष्ठान में विभिन्न पदों पर पुनरीक्षित वेतनमान को स्वीकृति।

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महोदय,

मुझे उपर्युक्त विषयक शासनादेश संख्या–एस–3–2024/दस–100(56अ)/89, दिनाँक 10–7–89 के आंशिक संशोधन में यह कहने का निर्देश हुआ है कि प्रदेश के विभिन्न वर्गो के कर्मचारियों हेतु समता समिति (1989) की संस्तुतियों पर विचार करने के लिए गठित मुख्य सचिव समिति की संस्तुतियों के परिपेक्ष्य में लिये गये निर्णयानुसार राज्यपाल महोदय उक्त शासनादेश के संलग्नक के पृष्ठ–1 के क्रम संख्या–2. 3. 4 के सम्मुख स्तम्भ–2 में उल्लिखित पदनामो के लिये स्तम्भ–8 में अंकित वेतनमान तथा स्तम्भ–9 में की गयी अभियुक्ति के स्थान पर इस शासनादेश के साथ संलग्न तालिका में अंकित वेतनमान तथा अभ्युक्तियों को प्रतिस्थापित करने की सहर्ष स्वीकृति प्रदान करते है। उक्त शासनादेश दिनांक 10–7–07 इस सीमा तक संशोधित समझा जाय।

भवदीय
ह0–
(रमा शंकर चौधरी)
उप सचिव।

61. Rule 7(1) & (2) of 2014 Rules reads as under:-

"7. Recruitment to the various categories of posts in the service shall be made from the following sources:

(1) Junior Assistant -

(i) Eighty percent by direct recuritment.

(ii) Fifteen percent by promotion from amongst substantively appointed Group 'D' employees who have passed the High School Examination of the Board of High School and Intermediate Education, Uttar Pradesh or an Examination recognised by the Government as equivalent thereto and who possess the knowledge of typewriting in accordance with the Uttar Pradesh Subordinate offices Ministerial Group 'C' Posts of the Lowest Grade (Recruitment by Promotion Rules, 2001, as amended from time to time.

(iii) Five percent by promotion from amongst substantively appointed Group 'D' employees who have passed the Intermediate Examination of the Board of High School and Intermediate Education, Uttar Pradesh or an Examination recognised by the Government as equivalent thereto and who possess the knowledge of typewriting in accordance with the Uttar Pradesh Subordinate offices Ministerial Group 'C' Posts of the Lowest Grade (Recruitment by Promotion Rules, 2001, as amended from time to time.

(2) Senior Assistant -

By promotion through the Selection Committee from amongst substantively appointed Junior Assistants who have completed at least five years service as such on the first day of the year of recruitment."

62. Rule 5(1)(i) & (ii) of 2019 Rules reads as under:-

"5- Recruitment to the different categories of posts in the service shall be made from the following sources:-

(1) Assistant Treasury Accountant:

(i) Ninety Six percent by direct recruitment through the Commission.

(ii) Four percent by promotion through the Departmental Selection Committee from amongst substantively appointed Junior Assistants of the treasuries, who have completed five years of service as such and have passed departmental examination on the first day of the year of recruitment."

63. Crux of the argument advanced by counsel(s) appearing on behalf of the petitioners of Category - II & III of the writ petitions is that the petitioners appeared in the written examination for the post of Assistant Treasury Accountant in pursuance of Advertisement dated 05.07.2016 and they have qualified the same. Thereafter, they were called for interview. Earlier, the Government imposed ban upon the recruitment process on the ground that the said advertisement was issued in contrary to the provisions of 1978 Rules.

64. It is also argued on behalf of the petitioners that government can relax the Rules in respect of a class to appoint requisite qualified persons to mitigate the undue hardship without amending the Rules, and executive power under Article 162 of Constitution is co-extensive with legislative power to regulate the recruitment.

65. Further argument of the counsel(s) for the petitioners is that Government Orders dated 21.03.1990 and 30.04.1993 were issued by the Government in exercise of Rules 4 & 26 of 1978 Rules and the said rules have not been considered by the co-ordinate Bench of this Court while dealing with Indra Kumar Shrotria's case (supra). It is also the argument of the counsel(s) for the petitioners that since the petitioners have already qualified the written examination and appeared in the interview, therefore, there is a legitimate expectation of appointment of the petitioners on the post advertised.

66. Argument of learned Additional Advocate General on behalf of State is that there is no illegality in the impugned order dated 25.07.2019 as the same has been passed after considering 1978 Rules. It is further argued that provisions of statutory rules cannot be superseded by issuance of government orders. The advertisement was not in conformity with the 1978 Rules, as such, the same is untenable in the eyes of law.

Issue No.I is dealt as follows:-

67. Rule 5 of 1978 Rules deals with recruitment of various category of the posts in service. According to this provision, the post of Senior Grade Clerk/Assistant Treasury Accountant was required to be filled by way of promotion. However, subsequently, vide Government Order dated 21.03.1990, the post of Junior Clerk and Senior Clerk was merged but no amendment was made in the 1978 Rules.

68. From the discussions aforesaid, it is clear that the rules framed by the State exercising its power under proviso to Article 309 of Constitution of India, providing for recruitment to the post of Routine Grade Clerk and Senior Grade Clerk is distinct from what is provided in the Government Orders. The examination of rules as well as government orders makes it explicit that government order, which has been relied upon for the purpose of issuing advertisement is wholly inconsistent with the statutory rules framed by the State Government in 1978.

69. It is settled law that administrative instructions have no statutory force. The question as to whether an administrative

instruction has a statutory force or not cannot be determined by checking whether the statutory provisions permit the administrative agency to issue such instructions. Any administrative instruction/government order given by a statutory body under its rule making powers dealing with service matters are not considered to have statutory backing.

70. Executive instructions cannot amend or supersede the statutory rules or add something therein, nor the orders be issued in contravention of the statutory rules for the reason that an administrative instruction is not a statutory rule nor does it have any force of law. In ***Union of India & Ors. v. Somasundaram Vishwanath & Ors.***16, the Hon'ble Supreme Court observed that if there is a conflict between the executive instructions and the rule framed under the proviso to Article 309 of the Constitution, the rules will prevail. Similarly if there is a conflict in the rules made under the proviso to Article 309 of the Constitution and the law, the law will prevail.

71. In ***Ram Ganesh Tripathi & Ors. v. State of U.P. & Ors.***17, the Hon'ble Supreme Court considered the similar controversy and held that any executive instruction/order which runs counter to or is inconsistent with the statutory rules cannot be enforced, rather deserves to be quashed as having no force of law.

72. The Hon'ble Supreme Court in the case of ***Union of India & Ors. v. S.L. Abbas***18, held that the instructions regarding the transfer of government servants requiring husband and wife to be posted at one place was a policy that government normally followed but not meant to be followed always. Therefore, the lack of statutory force can be seen as the reason for non-binding nature of administrative instructions or government orders.

73. The main purpose of administrative instruction/government order is to fill the lacunae in statutes and supplement the rules and regulations. It is often observed that such instructions directly trench upon the ambit of legislature. This gives rise to confusion as to whether the statute will be binding or the administrative instructions.

74. In the case of ***Jagjit Singh v. State of Punjab***19, the Hon'ble Supreme Court has held that administrative decisions which run counter to statutory rules are not binding and their violation cannot be enforced in a Court of law. It is also held that the administrative decisions issued by Executive Authority cannot supersede a statutory provision.

75. In the case of ***V.T. Khanzode v. Reserve Bank of India***20, the Hon'ble Supreme Court dealt with the binding nature of administrative instruction that modify a law promulgated by legislature. In this case, Reserve Bank of India laid down guideline for promotion of its employees. As per the regulations, the promotion could only be within the group to which employee belonged or on the basis of seniority. Later another circular issued by Reserve Bank of India changed this system. In this case, the staff regulation was held not to be under the Reserve Bank of India Act, 1934 and therefore, was not a rule.

76. In ***Punit Rai v. Dinesh Chaudhaty***21 and ***State of Kerala & Anr. v. Chandra Mohan***22, the Apex Court held that executive instructions cannot be

termed as law within the meaning of Article 13(3)(a) of the Constitution of India.

77. In the instant case, if the post of Senior Clerk which has been re-designated as Assistant Treasury Accountant, is treated to be filled by way of direct recruitment, the avenues of promotion which are available to Routine Grade Clerk under the 1978 Rules would be taken away. The co-ordinate Bench of this Court in *Indra Kumar Shrotria (supra)* has already observed that the qualifications as well as the other conditions of service have all been provided for in the 1978 Rules. It is admitted facts that these rules have not undergone any amendment.

78. The petitioners expressly emphasised that Rule 4 of the 1978 Rules empowers the State Government to determine the strength or to alter the strength of service by executive orders. They have also emphasised that Rule 26 of 1978 Rules empowers the State Government to dispense with or relax the requirement of any rule. I have perused Rule 4 of 1978 Rules, it does not empower the department/government to issue any administrative order/government order in contrary to any provision of 1978 Rules. Government orders may be issued from time to time in conformity with the provisions of 1978 Rules. Here, the government orders issued from time to time by the department changed the scope of Rule 5 of 1978 Rules. The entire provisions of recruitment has been amended/changed by the administrative order(s). An executive order cannot go against or override the express statutory prescriptions. Unless the rules are amended in terms of the executive order, by appropriate means, the same cannot be sought to be enforced.

Issue No. II is dealt as follows:

79. In ***M/s. Bishamber Dayal Chandra Mohan v. State of U.P. and Ors.***23, the Hon'ble Supreme Court explained the difference in a statutory order and an executive order observing that executive instruction issued under Article 162 of the Constitution does not amount to law. However, if an order can be referred to a statutory provision and held to have been passed under the said statutory provision, it would not be merely an executive fiat but an order under the Statute having statutory force for the reason that it would be a positive State made law. So, in order to examine as to whether an order has a statutory force, the Court has to find out and determine as to whether it can be referred to the provision of the Statute.

80. In ***Rai Sahib Ram Jawaya Kapur & Ors. v. State of Punjab***24, the Supreme Court held that it was not necessary that there should be law already in existence before the executive is enabled to function and that the powers of the executive were limited merely to the carrying out of these laws. There was nothing in terms of Article 309 of the Constitution of India which abridges the powers of executive to act under Article 162 of the Constitution of India without a law. The Court, however, put a word of caution in mentioning that if there is a statutory rule or an Act on the matter, the executive must abide by that Act or Rule. It could not in exercise of executive power under Article 162 of the Constitution of India ignore or act contrary to that Rule or Act.

81. The State is bound by the constitutional scheme to treat all persons equally in the matter of grant of public employment as envisaged under Article 14

& 16 of the Constitution of India. Policy taken by the State in exercise of its jurisdiction under Article 162 of the Constitution of India would be subservient to the recruitment rules framed by the State either in terms of a legislative act or the proviso appended to Article 309 of Constitution of India. A purported policy decision issued by way of an executive instruction can not override the statute or statutory rules far less the constitutional provisions. The executive power of the State cannot be exercised in the field which is already occupied by the laws made by the legislature. It is settled law that any order, instruction, direction or notification issued in exercise of the executive power of the State, which is contrary to any statutory provisions, is without jurisdiction and is nullity.

82. Though, the argument of the learned counsel for the petitioners appears to be attractive, it cannot be accepted in view of the settled law that government order(s)/administrative order(s)/executive order(s) cannot override the statutory rules i.e. 1978 Rules. The department may be advised to take necessary action to amend all the relevant rules separately instead of issuing government orders contrary to the provisions of 1978 Rules. It is also taken into notice that the 2019 Rules have already been promulgated. It is argued on behalf of the State that after promulgation of 2019 Rules, it would be appropriate to initiate fresh recruitment in accordance with 2019 Rules, after issuing fresh advertisement.

83. In view of the above legal proposition as held by Hon'ble Supreme Court, it is settled law that executive instructions cannot override the statutory provisions. Executive instructions cannot amend or supersede the statutory rules or add something therein, nor the orders issued in contravention of statutory rules for the reason that an administrative instruction is not a statutory rule nor does it have any force of law. Consequently, the Government Order dated 21.03.1990 whereby the post of Routine Grade Clerk/Junior Clerk/Assistant Treasury Accountant Grade - II and Senior Clerk/Assistant Treasury Accountant Grade - I was merged thereby creating a new substantive post of Assistant Treasury Accountant is violative of Rule 5 of 1978 Rules as the said rule does not provide for any such post.

84. In view of the above, Issue No. I is answered as any executive instruction cannot be issued in contravention of the rules framed under the proviso to Article 309 of Constitution of India and statutory rules cannot be set at naught by the executive fiat.

85. Issue No.II is answered as the policy taken by the State in exercise of its jurisdiction under Article 162 of the Constitution of India would be subservient to the recruitment rules framed by the State either in terms of a legislative act or the proviso appended to Article 309 of Constitution of India.

Issue No.III is dealt as follows:

86. So far as contention of the petitioners' counsel in respect of legitimate expectation and vested right of the petitioners of Category - II & III of the writ petitions for appointment on the post of Assistant Treasury Accountant is concerned, the Hon'ble Supreme Court in Para - 12 & 16 in the case of ***Jatinder Kumar & Ors. v. State of Punjab & Ors.25***, has held as under:-

12.....Whenever the Government is required to make an appointment to a higher public office it is required to consult the Public Service Commission. The selection has to be made by the Commission and the Government has to fill up the posts by appointing those selected and recommended by the Commission adhering to the order of merit in the list of candidates sent by the Public Service Commission. ***The selection by the Commission, however, is only a recommendation of the Commission and the final authority for appointment is the Government. The Government may accept the recommendation or may decline to accept the same****. But if it chooses not to accept the recommendation of the Commission the Constitution enjoins the Government to place on the table of the Legislative Assembly its reasons and report for doing so. Thus, the Government is made answerable to the House for any departure vide Article 323 of the Constitution. This, however, does not clothe the appellants with any such right. They cannot claim as of right that the Government must accept the recommendation of the Commission. If, however, the vacancy is to be filled up, the Government has to make appointment strictly adhering to the order of merit as recommended by the Public Service Commission. It cannot disturb the order of merit according to its own sweet will except for other good reasons viz. bad conduct or character. The Government also cannot appoint a person whose name does not appear in the list.* ***But it is open to the Government to decide how many appointments will be made. The process for selection and selection for the purpose of recruitment against anticipated vacancies does not create a right to be appointed to the post which can be enforced by a mandamus.***

"16. An argument of desperation was further advanced about promissory estoppel stopping the State Government from acting in the manner it did in not appointing the appellants although their names had been recommended. The notification issued by the Board in this case was only an invitation to candidates possessing specified qualifications to apply for selection for recruitment for certain posts. It did not hold out any promise that the selection would be made or if it was made the selected candidates would be appointed. The candidates did not acquire any right merely by applying for selection or for appointment after selection. When the proposal for disbandment of the Punjab Armed Police Battalion and instead creation of additional posts for the district police was turned down by the State Government, the appellants were duly informed of the situation and there was no question of any promissory estoppel against the State."

(Emphasis supplied)

87. In the case of ***S.S. Balu v. State of Kerala***26, the Hon'ble Supreme Court has held that a person does not acquire a legal right to be appointed only because his name appears in the select list. The State as an employer has a right to fill up all the posts or not to fill them up.

88. In the case of ***Rajasthan Public Service Commission v. Chanan Ram & Anr.***27, the following has been held in Para - 17 (relevant portion):

"17. In the case of State of M.P. v. Raghuveer Singh Yadav [(1994) 6 SCC 151 : 1994 SCC (L&S) 1317 : (1994) 28 ATC 255] a Bench of two learned Judges of this Court consisting of K. Ramaswamy and N. Venkatachala, JJ., had

to consider the question whether the State could change a qualification for the recruitment during the process of recruitment which had not resulted into any final decision in favour of any candidate. In paragraph 5 of the Report in this connection it was observed that it is settled law that the State has got power to prescribe qualification for recruitment. ***In the case before the Court pursuant to the amended Rules, the Government had withdrawn the earlier notification and wanted to proceed with the recruitment afresh. It was held that this was not the case of any accrued right. The candidates who had appeared for the examination and passed the written examination had only legitimate expectation to be considered according to the rules then in vogue. The amended Rules had only prospective operation. The Government was entitled to conduct selection in accordance with the changed rules and make final recruitment. Obviously no candidate acquired any vested right against the State. Therefore, the State was entitled to withdraw the notification by which it had previously notified recruitment and to issue fresh notification in that regard on the basis of the amended Rules.....*** *"*

(Emphasis supplied)

89. It is settled law that there is no legal right vested in the candidates to be selected for appointment. Selected candidates have only "a right to be considered" whereas in the facts of the present case, the petitioners are not even selected for the post in question. When selected candidates cannot claim, as a matter of right, to be appointed then where is the question of appointment of those who are not even selected. Merely because a candidate's name appear in the select list, it will not entitle him to be appointed. Thus, facts of the present case is worse as the present petitioners are not even falling within the category of select list. Thus, petitioners of Category - II & III of the writ petitions have no legal right to be appointed for the post in question. In such circumstances, impugned order dated 25.07.2019 withdrawing the requisition dated 23.06.2016 and advertisement dated 05.07.2016, which were violative of 1978 Rules, is correct and in accordance with law.

90. Accordingly, Issue No.3 is answered as above.

91. So far as petitioners of Category - I of writ petitions are concerned, they are claiming promotion on the post of Senior Clerk/Assistant Treasury Accountant as per 1978 Rules. The Hon'ble Supreme Court in the case of ***S.B. Bhattacharjee v. S.D. Majumdar***28, the following has been held:-

"13. Although a person has no fundamental right of promotion in terms of Article 16 of the Constitution of India, he has a fundamental right to be considered therefor. An effective and meaningful consideration is postulated thereby. The terms and conditions of service of an employee including his right to be considered for promotion indisputably are governed by the rules framed under the proviso appended to Article 309 of the Constitution of India."

92. Clause (1) of Article 16 is a facet of Article 14 and that it takes its roots from Article 14 of Constitution of India. The said clause particularises the generality in Article 14 and identifies, in a constitutional sense "equality of opportunity" in matters of employment and appointment to any

office under the State. The word "employment" being wider, there is no dispute that it takes within its fold, the aspect of promotions to posts above the stage of initial level of recruitment. Article 16(1) provides to every employee otherwise eligible for promotion or who comes within the zone of consideration, a fundamental right to be "considered" for promotion. Equal opportunity here means the right to be "considered" for promotion. If a person satisfies the eligibility and zone criteria but is not considered for promotion, then there will be a clear infraction of his fundamental right to be "considered" for promotion, which is his personal right.

93. In view of foregoing discussion, I do not find any illegality in the order dated 25.07.2019 whereby requisition dated 23.06.2016 and advertisement dated 05.07.2016 have been withdrawn. Consequently, writ petitions of Category - II & III viz. Writ Petition Nos. 24163 (SS) of 2019, 24568 (SS) of 2019, 8430 (SS) 2019, 31120 (SS) of 2019, 34847 (SS) of 2019, 5246 (SS) of 2019, 33850 (SS) of 2019, 1227 (SS) of 2020, 2346 (SS) of 2020, 1930 (SS) of 2020, 3920 (SS) of 2020, 4809 (SS) of 2020, 13450 (SS) of 2020, 2283 (SS) of 2020, 5096 (SS) of 2020, 18174 (SS) of 2020, 19826 (SS) of 2020 & 612 (SS) of 2021 are ***dismissed.***

Writ petitions of Category - I viz. Writ Petition Nos. 3522 (SS) of 2018, 5117 (SS) of 2018, 29564 (SS) of 2018, 22992 (SS) of 2018, 19124 (SS) of 2018 & 14474 (SS) of 2018 are ***disposed of*** with direction to the respondents to consider the petitioners thereof for promotion on the post of Senior Clerk/Assistant Treasury Accountant in accordance with 1978 Rules as amended from time to time.

(2021)06ILR A327
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.03.2021

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE RAVI NATH TILHARI, J.

Writ-C No. 2010 of 2020

Akhilesh Tiwari ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Rishi Kant Rai, Sri Sunil Kumar Singh

Counsel for the Respondents:
C.S.C.

Fair Price Shop - Reservation criteria - G.O. dated 05.08.2019 - challenge to Sub Clauses (1) & (2) of Clause (II) - Sub Clause (1) of Clause (II) provide cut of date for identification of fair price shop at Block level for reservation - cut off date so provided neither suffer from any invalidity nor it violates any of the fundamental rights of the petitioners - Sub Clause(2) of Clause (II) provides that in future if a shop has been identified for reserved category, falls vacant, then its license shall be settled in that category - this clause also does not violate Article 14 and Article 15 of the Constitution of India - G.O. protects the existing licensees - it provides that licenses of the existing licensees shall not be disturbed/cancelled & as and when a shop fall vacant then it shall be governed by the reservation policy under the Government order - challenge to both clause rejected.
Dismissed. (E-4)

(Delivered by Hon'ble Surya Prakash Kesarwani, J. & Hon'ble Ravi Nath Tilhari, J.)

1. Heard Sri Rishi Kant Rai, learned counsel for the petitioner and the learned standing counsel for the State respondents.

2. This writ petition has been filed praying for the following relief:-

"(I) Issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 13.11.2019, passed by the respondent no.2 (Annexure No.6).

(ii) Issue writ, order or direction declaring the Clause-II (1) & (2) of the Govt. Order dated 05.08.2021 as Ultra Vires against the constitutional provisions and Articles 14 and 15 of the Constitution of India as well as against the law laid down by the Constitutional Bench in Indra Sawhney (Supra) Case.

(iii) Issue a writ, order or direction in the nature of mandamus directing the respondent no.2 to allocate the Fair Price Shop of Village Gulriya in favour of general category candidate.

(iv) Issue any other appropriate writ, order or direction to which the petitioner be found entitled under the facts and circumstances of the case.

(v) Award costs in favour of the petitioner."

3. Briefly states facts to the present case are that the petitioner claims to be resident of Village Gulriya Kohar Gaddi, Block Nebua Naurangiya, Tehsil Khadda, District Kushinagar. Earlier the aforesaid fair price shop license was held by a person belonging to unreserved category. On cancellation of his license of the fair price shop by order dated 26.07.2019, the aforesaid fair price shop fell vacant. Applying the reservation criteria as provided under the Government Order No.6/2019/1358/29-6-2019-162-Sa/2001 dated 05.08.2019, the Sub Divisional Officer, Tehsil Khadda, District Kushinagar, vide impugned order dated 13.11.2019, directed the Block Development Officer, Block Nebua Naurangiya, Kushinagar to apply the reservation in fair price shop licenses, as per the aforesaid Government Order dated 05.08.2019 and accordingly to proceed for selection of a fair price shop licensee of Village Panchayat Gulriya under the category of Scheduled Caste. Aggrieved with the reservation of the fair price shop in question i.e. Village Panchayat Gulriya, the petitioner has filed the present writ petition, praying for the reliefs aforequoted.

Submissions:

4. Learned counsel for the petitioner submits that presently as per the letter of the Sub Divisional Magistrate, Tehsil Khadda, District Kushinagar dated 29.07.2019, there are 92 fair price shops, out of which 25 licenses are held by the persons belonging to schedule caste/schedule tribe and 50 licenses are held by the persons belonging to OBC category. Thus out of total 92 fair price shop 75 shops are being run by persons of reserved category and, therefore, the reservation as has been provided under the Government Order dated 05.08.2019 already stands achieved. Consequently reservation applied under the impugned Clauses of the Government Order dated 05.08.2019 for reservation of the fair price shop "Gulriya", violates the Rules of Reservation, in as much as it exceed to permissible limit. He therefore, submits that the impugned Government Order to the extent of Clause-II (1) & (2) deserves to be declared Ultra Vires, to Articles 14 and 15 of the Constitution of India and the principles of law laid down by the Constitution Bench of Hon'ble Supreme

Court in **Indra Sawhney Case, 1992 Suppl. (3) SCC 217**.

5. Learned standing counsel submits that the cut of date for the purposes of the reservation has been provided in the Government Order dated 05.08.2019 as the year 2015 and on that basis identification of the reserved fair price shop has been made. He further submits that before applicability of reservation under the impugned Government Order dated 05.08.2019, those who were continuing with their licenses, have not been disturbed, and reservation for license of fair price shop either under the reserved category or under the unreserved category shall be applied with respect to a particular shop as and when it becomes vacant. Since the shop of Village Panchayat Gulriya fell under the reserved category of scheduled caste and, therefore, when it became vacant on 26.07.2019, the said shop was notified for grant of license under the reserved category. Referring to various paragraphs of the counter affidavit, learned standing counsel further submits that the percentage of reservation made under the Government Order dated 05.08.2019, neither exceeds the permissible limit of 50% nor it is the case of the petitioner that the fair price shop reserved under the aforesaid Government Order exceeds 50%. To support his submissions he also invited attention of this Court to the copy of the minutes of the meeting dated 30.09.2019, filed as annexure no.1, to the counter affidavit; with which a chart has been enclosed containing details of shops and reservation in terms of Government Order dated 05.08.2019 are mentioned.

Discussions and findings

6. We have carefully considered the submissions of learned counsel for the parties.

7. Before we proceed to consider the rival submissions of learned counsel for the parties, it would be appropriate to reproduce the impugned portions, Clauses I and II of the aforesaid Government Order dated 05.08.2019, as under:-

"(I) आरक्षण व्यवस्था का निर्धारण-

1- उचित दर की दुकानों के आवंटन/चयन हेतु निम्नानुसार वर्टिकल आरक्षण व्यवस्था अनुमन्य होगी:-

(क) अनुसूचित जाति - 21 प्रतिशत

(ख) अनुसूचित जनजाति - 02 प्रतिशत

(ग) अन्य पिछड़े वर्ग - 27 प्रतिशत

(घ) आर्थिक रुप से ऐसे कमजोर वर्ग जो, - 10 प्रतिशत

अनुसूचित जाति अनुसूचित जनजाति तथा

पिछड़े वर्गों के लिए आरक्षण की आरक्षण की

वर्तमान व्यवस्था से आच्छादित नहीं है,

हेतु (कार्मिक विभाग के पत्र सं0-1/2019/4

/1/2002/क-2/19टीसी-11, दिनांक 18-2-2019

में निहित शर्तों एवं व्यवस्था के अनुसार)

2- उपर्युक्तानुसार आरक्षित एवं अनारक्षित श्रेणियों में निम्नलिखित होरिजेन्टल आरक्षण भी अनुमन्य होगा:-

(क) संबंधित श्रेणी की महिलाओं को - 20 प्रतिशत

(ख) संबंधित श्रेणी के लड़ाई में मारे गये सैनिक के परिवार के - 05 प्रतिशत

सदस्य, कर्तव्य निर्वहन के दौरान मारे गये केन्द्रीय सशस्त्र

पुलिस बलों के परिवार के सदस्य, लड़ाई में घायल हुए

सैनिक अथवा उसके परिवार के सदस्य, कर्तव्य निर्वहन

के दौरान घायल केन्द्रीय सशस्त्र पुलिस बलों के सदस्य अथवा

उसके परिवार के सदस्य तथा भूतपूर्व सैनिक।

(ग) संबंधित श्रेणी के स्वतंत्रता संग्राम सेनानी, उनकी पत्नी तथा - 05 प्रतिशत

स्वतंत्रता संग्राम सेनानी के आश्रित के रुप में पुत्र और पुत्री तथा पौत्र

(पुत्र का पुत्र एवं पुत्री का पुत्र) और पौत्री (पुत्र की पुत्री एवं पुत्री की पुत्री)

(विवाहित अथवा अविवाहित)

(घ) सम्बन्धित श्रेणी के विकलांग व्यक्तियों के लिए

दृष्टिहीनता या कमदृष्टि - 01 प्रतिशत

श्रवण ह्रास - 01 प्रतिशत

चलन क्रिया सम्बन्धी निःशक्ता या प्रमस्तिष्कीय अंगघात - 01 प्रतिशत

कुल 03 प्रतिशत

3- जनपद में ग्रामीण क्षेत्र हेतु स्वीकृत समस्त उचित दर दुकानों (कार्यरत एवं रिक्त) की ब्लाकवार गणना करते हुये उनके आरक्षण का चिन्हॉकन उपर्युक्त प्रस्तरों में वर्णित व्यवस्थानुसार किया जायेगा, परन्तु उक्त आरक्षण प्रतिशत को पूर्ण करने के लिए वर्तमान में चल रही दुकानों को निरस्त नहीं किया जायेगा। वर्तमान में रिक्त एवं यदि कोई दुकान किसी कारणवश निरस्त होती है, तब उस पर नई नियुक्ति के समय इस शासनादेश के अनुसार आरक्षण पूर्ण करने की कार्यवाही की जायेगी।

(II) आरक्षण की गणना हेतु प्रक्रिया का निर्धारणः-

(1) विकास खण्ड को एक यूनिट मानते हुए तहसील स्तरीय समिति द्वारा आरक्षण की गणना की जायेगी। प्रत्येक विकास खण्ड में कुल स्वीकृत दुकानों में से आरक्षित श्रेणी के चिन्हॉकन हेतु पंचायती राज विभाग, उत्तर प्रदेश द्वारा वर्ष 2015 में ग्राम सभा की जनसंख्या के प्रतिशत के आधार पर, ग्राम प्रधान के पदों में लागू आरक्षण व्यवस्था की भाँति दुकानों को चिन्हित व आरक्षित किया जायेगा। ग्रामीण क्षेत्रों में उचित दर दुकानों के आरक्षण के चिन्हॉकन का यही मुख्य आधार होगा।

(2) भविष्य में उक्तानुसार आरक्षित श्रेणी के अन्तर्गत चिन्हित दुकाने जैसे-जैसे रिक्त होती जायेगी, उनका आवंटन उसी श्रेणी के अभ्यर्थियों को किया जायेगा।

(3) एक से अधिक दुकानों की ग्राम सभा में पहली दुकान को उपरोक्तानुसार निर्धारित प्रक्रिया के अनुसार आरक्षित किया जायेगा। इस ग्राम सभा की शेष दुकानों की श्रेणी के सम्बन्ध में, सम्बन्धित विकास खण्ड में, दुकानों में आरक्षण की स्थित का संज्ञान लेते हुये, ग्राम सभा की जनसंख्या के प्रतिशत के आधार पर, अन्तिम निर्णय तहसील स्तरीय चयन समिति द्वारा लिया जायेगा। यह ध्यान रखा जायेगा कि सम्बन्धित ब्लॉक में दुकानों के आरक्षण का प्रतिशत पूर्ण रहे।

(4) अनारक्षित ग्रामसभाओं हेतु किसी भी वर्ग का अभ्यर्थी निर्धारित औपचारिकताओं को पूर्ण करके आवेदन कर सकता है।

(5) विकास खण्ड में कुल स्वीकृत दुकानों के सापेक्ष आरक्षणवार उचित दर दुकानों का चिन्हॉकन तो कर लिया जायेगा, परन्तु वर्तमान में कार्यरत किसी भी उचित दर दुकान को इस चिन्हॉकन के परिप्रेक्ष्य में निरस्त नहीं किया जायेगा।

(6) ग्रामीण क्षेत्र में राशन की दुकानों के आवंटन की कार्यवाही निम्नानुसार गठित तहसील स्तरीय समिति द्वारा की जायेगीः-

(क) उप जिलाधिकारी - अध्यक्ष

(ख) संबंधित खण्ड विकास अधिकारी - सदस्य

(ग) अनुसूचित जाति/जनजाति एवं पिछड़ी - सदस्य

जाति का एक-एक अधिकारी जो जिलाधिकारी

द्वारा नामित किया जाये (यदि उपर्युक्त अधिकारियों

में कोई अधिकारी इस वर्ग का हो तो अलग से नामांकन

करने की आवश्यकता नहीं होगी)

(घ) क्षेत्रीय खाद्य अधिकारी - सदस्य/संयोजक

(7) होरिजेन्टल आरक्षण के अन्तर्गत कुल स्वीकृत दुकानों के सापेक्ष ग्राम सभाओं का चिन्हांकन निर्धारित प्रतिशत तक लाटरी पद्वति के आधार पर ही किया जायेगा। होरिजेण्टल आरक्षण के अनुसार प्रत्येक श्रेणी के लिए क्रमवार एक-एक पर्ची तब तक निकाली जायेगी, जब तक निर्धारित होरिजेण्टल आरक्षण पूर्ण नहीं हो जाता।

(8) आरक्षण की गणना की कार्यवाही की वीडियो रिकार्डिंग करायी जायेगी तथा इसे संरक्षित रखा जायेगा।

(9) उपर्युक्तानुसार चिन्हांकित वर्टिकल एवं होरिजेन्टल आरक्षण का ग्राम सभावार मास्टर रजिस्टर बनाया जायेगा, जिसकी एक प्रति जिला पूर्ति कार्यालय एवं एक प्रति तहसील स्तरीय उप जिलाधिकारी कार्यालय में सुरक्षित रखी जायेगी। सम्बन्धित तहसील के क्षेत्रीय खाद्य अधिकारी का यह दायित्व होगा कि वह उक्त मास्टर आरक्षण रजिस्टर दोनों कार्यालयों में उपलब्ध करायें।

(10) होरिजेन्टल आरक्षण के अन्तर्गत यदि सम्बन्धित श्रेणी का कोई आवेदक ग्राम सभा में उपलब्ध न हो तो जिलाधिकारी को छूट होगी कि वह होरिजेन्टल आरक्षण श्रेणी के अन्तर्गत उस स्थान को किसी अन्य श्रेणी के लिए चिन्हॉकित कर दें एवं जिस श्रेणी का अभ्यर्थी उपलब्ध नहीं था, उस श्रेणी के लिए किसी अन्य स्थान को आवंटित कर दें, जिससे हॉरिजेण्टल आरक्षण पूर्ण हो सके।

(11) प्रस्तर-(I) 2 (ग) के अन्तर्गत पात्र अभ्यर्थी उपलब्ध न होने की स्थिति में उस रिक्ति को सर्वप्रथम (I) 2 (ख) के अभ्यर्थी से भरने का प्रयास किया जायेगा।"

8. The percentage of reservation as provided under Clause (I) of the impugned Government Order is neither in dispute nor under challenge. Only Sub Clauses (1) and (2) of Clause (II) are impugned in the present writ petition. Sub Clause (3) of Clause (I) of the aforesaid Government Order provides the procedure for identification of fair price shop for reservation. It further provides that to achieve the reservation, license/existing licenses of fair price shop shall not be cancelled and in the event any fair price shop fall vacant or its license is cancelled then reservation shall be applied in respect thereof, as per the Government Order. The undisputed chart as appended with the minutes of the meeting dated 30.09.2019 also reflect that the reservation of fair price shop at Block Level does not exceed 50% of the total number of the fair price shops. Sub Clause (1) of Clause (II) provided a cut of date for identification of fair price shop at Block level for reservation. The cut of date so provided has neither been shown to us to be suffering from any invalidity nor it violates any of the fundamental rights of the petitioners guaranteed under the Constitution of India. Therefore, the challenge to Sub Clause(1) of Clause (II), deserves rejection and is hereby rejected.

9. Sub Clause(2) of Clause (II) provides that in future if a shop has been identified for reserved category, falls vacant, then its license shall be settled in that category. This clause also does not violate Article 14 and Article 15 of the Constitution of India. Therefore, challenge the aforesaid Sub Clause(2) of Clause (II) also deserves rejection and is hereby rejected.

10. Submission of learned counsel for the petitioner on the basis of number of existing licenses being held by the persons either belonging to the OBC category or SC/ST category, is totally meritless. The existing fair price shop licensees are running their shops from a long period much prior to the Government Order dated 05.08.2019. The Government Order itself protects the existing licensees. It provides that licenses of the existing licensees shall not be disturbed/cancelled and as and when a shop fall vacant then it shall be governed by the reservation policy under the Government order. For example, if a shop has been identified in terms of the Government Order dated 05.08.2019, to be under unreserved category but presently it is being held by a person belonging to a reserved category then if such a shop fall vacant in future then it shall fall under the unreserved category. Similarly, if the license of an existing shop although fall under the reserved category but presently license thereof is being held by a person belonging to unreserved category, then if in future such a shop fall vacant then its license shall be settled under the reserved category. Thus, we do not find any force in the submissions of learned counsel for the petitioner.

11. For all the reasons aforestated we find that the impugned Clauses of the Government Order dated 05.08.2019 do not suffer from any invalidity. The impugned order dated 13.11.2019 is in terms of the Government Order. Therefore, it also does not suffer from any illegality.

12. The writ petition has no merits. Therefore, it is hereby **dismissed**. However, there shall be no order as to costs.

(2021)06ILR A332
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.03.2021

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE RAVI NATH TILHARI, J.

Writ-C No. 2045 of 2020

Awadhesh Singh ...Petitioner
Versus
R.B.I., through Reg. Director, Kanpur & Ors. ...Respondents

Counsel for the Petitioner:
Shri Adarsh Singh, Sri Indra Raj Singh

Counsel for the Respondents:
Sri Sanjai Singh

Banking Laws - Customer Protection Limiting Liability of Customers in Unauthorized Electronic Banking Transactions - Clause nos. 5, 6, 9 - On receipt of report of an unauthorised transaction from the customer, banks must take immediate steps to prevent further unauthorised transactions in the account - Zero Liability of a Customer - A customer's entitlement to zero liability arise where the unauthorised transaction occurs on account of Contributory fraud/ negligence/ deficiency on the part of the bank (Para 8)

On 21.02.2019 petitioner shared his OTP (One Time Password) with stranger - due to sharing of OTP Rs. 1.00,000/- was withdrawn from the account of the petitioner - petitioner lodged a complaint in writing before the bank on 21.02.2019 requesting to freeze his bank account - Bank could not freeze the Bank Account which resulted in illegal withdrawal in four transactions on 22.02.2019 and another in five transaction on 23.02.2019 - *Held* - Bank was to ensure immediate response and to freeze the Bank Account after the petitioner reported unauthorized transaction on

21.02.2019 - petitioner entitled to zero liability because the unauthorized transaction was the result of negligence on the part of the Bank - bank liable to credit the amount involved in the unauthorized transaction in petitioner's account (Para 9, 10, 12)

Allowed. (E-4)

(Delivered by Hon'ble Surya Prakash Kesarwani, J. & Hon'ble Ravi Nath Tilhari, J.)

1. With the consent of the learned counsel for the parties, this writ petition has been finally heard, without calling for counter affidavit.

2. Heard Shri Adarsh Singh, learned counsel for the petitioner and Shri Sanjay Singh, learned counsel for respondent no. 2, the Punjab National Bank, Subedar Ganj, Prayagraj.

3. This writ petition has been filed praying for the following reliefs:-

"I. Issue a writ, order or direction in the nature of mandamus directing the respondent no. 1 Reserve Bank of India, 83/142 M.G. Road, Kanpur-208001 through its Regional Director, Kanpur and respondent no. 3 Complaint and Human Resource Development Section, Regional Office, Allahabad through its Manager (Banking Ombudsman) to consider the grievance of the petitioner and resolve the same, within stipulated period as may be fixed by this Hon'ble Court.

II. Issue a writ, order or direction in the nature of mandamus directing the respondent no. 2-Punjab National Bank, Subedar Ganj Allahabad Uttar Pradesh 211012 through its Branch Manager to credit the amount of Rs. 3 lacs. in the account no. 4763000400000990 of Punjab National Bank, Subedar Ganj Allahabad, Uttar Pradesh 211012 of the petitioner along with interest at the bank rate within stipulated time as may be fixed by the Hon'ble Court."

4. In paragraph nos. 4, 5, 6 and 7 of the writ petition, the petitioner has stated as under:-

"4. That it is pertinent to mention before this Hon'ble Court that the petitioner was having a balance of amount of Rs. 4,12,815/- to his credit in the aforesaid bank account maintained with the respondent no. 2 as on 21.02.2019, however, the evening of 21.02.2019 turned into a nightmare for the petitioner when he received a call on his Mobile NO 9794866805 from Mobile No 8013571289 and the person calling introduced himself as Finance and Account Officer in the Divisional Railway Manager and told the petitioner that he needed an OTP which will be notified in his mobile number for crediting the interest toward the provident fund of the petitioner, falling prey to the aforesaid request the petitioner informed the OTP which came on his mobile number shortly thereafter, and shockingly an amount of Rs. 20000 was immediately debited from the aforesaid account of the petitioner at 6.31 p.m. followed by 4 more more debit transactions of Rs. 20000/- each happened between 6.31 to 6.34 p.m. debiting the total amount of Rs. 1 lakh from the aforesaid account of the petitioner, realizing the same the petitioner immediately contacted the toll free number 1801802223 of the bank and requested it to seize/close the account of the petitioner and lodged complaints with regard to the last 5 unauthorized transaction, which is also evident by the perusal of the statement of messages received on the mobile phone of the petitioner in the intervening period. A

true copy of statement of SMS received on the mobile phone of the petitioner on 21.02.2019 are being filed herewith and marked as ANNEXURE NO. 1 to this writ petition.

5. That the petitioner also on the very next date i.e. 22.02.2019 filed a complaint before the Branch Manager Punjab National Bank Subedar Ganj, Allahabad and informed him about the fraud committed in his bank account and requested him to immediately cease the bank account and initiate refund of the amount of Rs. 1 lakh fraudently debited from his bank account, in addition to the aforesaid, the petitioner also made a complaint before the Station House Officer, Dhumanganj, Prayagraj on 22.02.2019 for lodging an First Information Report, in pursuance to which an First Information Report, was also lodged being case crime no. 0161 of 2019 under Sections 419 and 420 I.P.C., Police Station Dhumanganjj, Allahabad. A true copy of the application dated 22.02.2019 submitted before the Branch Manager, Punjab National Bank Subedar Ganj, Allahabad and copy of the application dated 22.02.2019 submitted before the Station House Officer, Police Station Dhoomanganj and Copy of First Information Report are being filed herewith and marked as ANNEXURE NO. 2 to this writ petition.

6.That inspite of the aforesaid complaint made by the petitioner before the Branch Manager of the aforesaid bank, it appears that no action/steps whatsoever was taken by any of the authorities of the bank for ceasing the bank account of the petitioner and initiating refund of Rs. 1 lakh fraudulently debited from his account on 21.02.2019 and as a result of which five more transactions took place on the eve of 22.02.2019 between 6.37 p.m. to 6.40 p.m. and shockingly Rs. 1 lakh more was fraudulently debited from the bank account of the petitioner in five equal amounts of Rs. 20000/- each and further Rs. 1 lakh more was fraudulently debited from his bank account on 23.02.2019 at about same time in the evening, thereby causing a loss of Rs. 3 lakhs to the petitioner on account of negligence of the Branch Manager. A true copy of statement of SMS received on 22.02.2019 and 23.02.2019 and complaint made by the petitioner and the acknowledgement of complaint made by the petitioner and a copy of the Bank Statement of the petitioner w.e.f. 21.02.2019 till 23.02.2019 are being filed herewith and marked as ANNEXURE No. 3 to this writ petition.

7. That petitioner being aggrieved against the suspicious conduct of the Bank Authorities as the non-cessation of the bank account of the petitioner even after his repeated request leading to further loss of Rs. 2 lakhs demonstrated collusion between the bank authorities and the fraudulent persons submitted another application dated 25.02.2019 before Station House Officer Dhumanganj, Prayagraj for lodging an First Information Report against the Bank authorities. A true copy of letter dated 25.02.2019 is being filed herewith and marked as ANNEXURE NO. 4 to this writ petition."

5. The aforequoted paragraph nos. 4, 5, 6 and 7 of the writ petition have been replied in paragraph nos. 3, 4 and 5 of the counter affidavit dated 29.01.2021 filed by the respondent nos. 2 and 3 which has been quoted below:-

"3. That the contents of paragraph no. 4 of the writ petition are matter of record. However, it is respectfully submitted that the petitioner being educated person shared his OTP (One Time Password) with

stranger person who called the petitioner on his mobile number. Due to the sharing of the OTP (One Time Password) with stranger person, Rs. 1.00,000/- was withdrawn from the account of the petitioner.

4. That the contents of paragraph no. 5 of the writ petition are matter of record, which can be verified from the original.

5. That, the contents of paragraph nos. 6 and 7 of the writ petition is not correct as stated therein. In reply it is respectfully submitted before this Hon'ble Court that due to the system error or network/server error the account of the petitioner was not freeze by the branch office of the bank on same day. It is further respectfully submitted before this Hon'ble Court that the branch has taken the action and send the request for freezing the account of the petitioner but it seems due to the system error or network/server error the account of the petitioner was not freeze. The account of the petitioner was freeze on 23.02.2019."

6. From perusal of the pleadings as quoted above, it is clear that the respondent nos. 1, 2 and 3 have admitted the following facts:-

I - After a sum of Rs. 1 lacs in four transactions of Rs. 20,000/- each and one transaction of Rs. 19,900/- were illegaly withdrawn from the petitioner's salary bank account No. 4763000400000990 in Punjab National Bank Subedar Ganj, Prayagraj between 6.31 p.m, to 6.34 on i.e. 21.02.2019 with S.R. Nos. A096936814, A096936863, A096936901, A096936942 and A096936979.

II - The petitioner again lodged a complaint in writing and presented it before the respondent no. 2 on 21.02.2019 requesting to freeze his Bank Account. In his written complaint he has referred to his above mentioned complaint made on tollfree number of the Bank.

III - The petitioner again made a complaint on the same day i.e. 21.02.2019 which he lodged on the toll free number of the Bank.

IV - The petitioner also lodged the first information report number 0161 of 2019 under Sections 419 and 420 I.P.C. P.S. Dhoomanganj, District-Prayagraj at 9.31 p.m.

V - The respondent no. 2 Bank was negligent to freeze the Salary Bank Account of the petitioner which fact is evident from the averments made in paragraph no. 5 of the counter affidavit.

VI - The respondent no. 2 Bank has admitted in paragraph no. 5 of the counter affidavit that "due to the system error of network/server error, the bank account of the petitioner was not freezed by the branch office of the Bank on the same day. The account of the petitioner was freezed on 23.02.2019.

VII - After registration of the complaint filed by the petitioner with the respondent no. 2 Bank and also request for freezing aforesaid Bank Account, the respondent Bank could not freeze the Bank Account which resulted in illegal withdrawal of Rs. 99,900/- in four transactions of Rs. 20,000/- each and one transaction of 19900/- on 22.02.2019 and another sum of Rs. one lacs in five transaction of Rs. 20,000 each on 23.02.2019.

7. Learned counsel for the petitioner has produced before us the Policy/Guideline **"Customer Protection-Limiting Liability of Customers in Unauthorized Electronic Banking Transactions"** circulated by Reserve Bank of India vide RBI/2017-18/15 DBR. No.

Leg. BC. 78/09.07.005/2017-18 dated 06.07.2017.

8. Clause nos. 5, 6, 7, 9, 11 and 12 of the aforesaid Policy/Guideline of the Reserve Bank of India are reproduced below:-

"5. Banks must ask their customers to mandatorily register for SMS alerts and wherever available register for e-mail alerts, for electronic banking transactions. The SMS alerts shall mandatorily be sent to the customers, while email alerts may be sent, wherever registered. The customers must be advised to notify their bank of any unauthorised electronic banking transaction at the earliest after the occurrence of such transaction, and informed that the longer the time taken to notify the bank, the higher will be the risk of loss to the bank/ customer. ***To facilitate this, banks must*** *provide customers with 24x7 access through multiple channels (at a minimum, via website, phone banking, SMS, e-mail, IVR, a dedicated toll-free helpline, reporting to home branch, etc.)* ***for reporting unauthorised transactions that*** *have taken place and/ or loss or theft of payment instrument such as card, etc.* ***Banks shall also enable customers to instantly respond by "Reply" to the SMS and e-mail alerts and the customers should not be required to search*** *for a web page or an e-mail address to notify the objection, if any. Further, a direct link for lodging the complaints, with specific option to report unauthorised electronic transactions shall be provided by banks on home page of their website.* ***The loss/ fraud reporting system shall also ensure that immediate response (including auto response) is sent to the customers acknowledging the complaint along with the registered complaint number****. The communication systems used by* ***banks to send alerts and receive their responses thereto must record the time and date of delivery of the message and receipt of customer's response, if any, to them. This shall be important in determining the extent of a customer's liability****. The banks may not offer facility of electronic transactions, other than ATM cash withdrawals, to customers who do not provide mobile numbers to the bank.* ***On receipt of report of an unauthorised transaction from the customer, banks must take immediate steps to prevent further unauthorised transactions in the account.***

Limited Liability of a Customer

(a) Zero Liability of a Customer

6. A ***customer's entitlement to zero liability shall arise*** *where the unauthorised transaction occurs in the following events:*

(i) ***Contributory fraud/ negligence/ deficiency on the part of the bank*** *(irrespective of whether or not the transaction is reported by the customer).*

(ii) Third party breach where the deficiency lies neither with the bank nor with the customer but lies elsewhere in the system, and the customer notifies the bank within three working days of receiving the communication from the bank regarding the unauthorised transaction.

(b) Limited Liability of a Customer

7. A customer shall be liable for the loss occurring due to unauthorised transactions in the following cases:

(i) In cases where the loss is due to negligence by a customer, such as where he has shared the payment credentials, the customer will bear the entire loss ***until he reports*** *the unauthorised transaction to the bank. Any loss occurring after the reporting of the unauthorised transaction shall be borne by the bank.*

(ii) In cases where the responsibility for the unauthorised electronic banking transaction lies neither with the bank nor with the customer, but lies elsewhere in the system and when there is a delay (of four to seven working days after receiving the communication from the bank) on the

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part of the customer in notifying the bank of such a transaction, the per transaction liability of the customer shall be limited to the transaction value or the amount mentioned in Table 1, whichever is lower.

Table 1

Maximum Liability of a Customer under paragraph 7 (ii)

Type of Account	***Maximum liability (₹)***
BSBD Accounts	***5,000***
All other SB accounts *Pre-paid Payment Instruments and Gift Cards* *Current/ Cash Credit/ Overdraft Accounts of MSMEs* *- Current Accounts/ Cash Credit/ Overdraft Accounts of Individuals with annual average balance (during 365 days preceding the incidence of fraud)/ limit up to Rs.25 lakh* *Credit cards with limit up to Rs.5 lakh*	***10,000***
All other Current/ Cash Credit/ Overdraft Accounts *Credit cards with limit above Rs.5 lakh*	*25,000*

Further, if the delay in reporting is beyond seven working days, the customer liability shall be determined as per the bank's Board approved policy. Banks shall provide the details of their policy in regard to customers' liability formulated in pursuance of these directions at the time of opening the accounts. Banks shall also display their approved policy in public domain for wider dissemination. The existing customers must also be individually informed about the bank's policy.

9. ***On being notified by the customer, the bank shall credit (shadow reversal) the amount involved in the unauthorised electronic transaction to the customer's account within 10 working days from the date of such notification by the customer (without waiting for settlement of insurance claim, if any). Banks may also at their discretion decide to waive off any customer liability in case of unauthorised electronic banking transactions even in cases of customer negligence. The credit shall be value dated to be as of the date of the unauthorised transaction.***

11. Taking into account the risks arising out of unauthorised debits to customer accounts owing to customer negligence/ bank negligence/ banking system frauds/ third party breaches, banks need to clearly define the rights and obligations of customers in case of unauthorised transactions in specified scenarios. Banks shall formulate/ revise their customer relations policy, with approval of their Boards, to cover aspects of customer protection, including the mechanism of creating customer awareness on the risks and responsibilities involved in electronic banking transactions and

customer liability in such cases of unauthorised electronic banking transactions. The policy must be transparent, non-discriminatory and should stipulate the mechanism of compensating the customers for the unauthorised electronic banking transactions and also prescribe the timelines for effecting such compensation keeping in view the instructions contained in paragraph 10 above. The policy shall be displayed on the bank's website along with the details of grievance handling/ escalation procedure. The instructions contained in this circular shall be incorporated in the policy.

Burden of Proof

12. ***The burden of proving customer liability*** *in case of unauthorised electronic banking transactions shall lie on the bank."*

9. From the facts admitted by the respondent Bank in its counter affidavit as aforenoted and the guidelines of the Reserve Bank of India, it is evident that there was negligence on the part of the respondent Bank due to which a sum of Rs. ninety nine thousand and nine hundred in four transactions of Rs. 20,000/- each and one transaction of Rs. 19,900/- on 22.02.2019 and another sum of Rs. one lacs in five transaction of Rs. 20,000 each on 23.02.2019 were illegally withdrawn through electronic Bank transaction, from the salary bank account of the petitioner. As per aforenoted guidelines of the Reserve Bank of India which is binding upon the respondent Bank, the respondent Bank was to ensure immediate response and to freeze the Bank Account after the petitioner reported unauthorized transaction on 21.02.2019

10. For the unauthorized aforesaid banking transactions in the bank account of the petitioner on 22.02.2019 and 23.02.2019 as per Clause VI of the aforequoted policy of the R.B.I., the petitioner is entitled to zero liability because the unauthorized transaction was the result of negligence on the part of the respondent Bank.

11. As per Clause 9 of the aforenoted policy of the Reserve Bank of India, on being notified by the customer, the bank shall credit (shadow reversal) the amount involved in the unauthorized electronic transaction to the customer's account within 10 working days from the date of such notification by the customer (without waiting for settlement of insurance claim, if any). Banks may also at their discretion decide to waive off any customer liability in case of unauthorized electronic banking transactions even in cases of customer negligence. The credit shall be value dated to be as of the date of the unauthorized transaction.

12. Since it is admitted by the respondent Bank that despite the petitioner lodged the complaint and notified it on 21.02.2019 and yet the respondent bank had not freezed the aforesaid bank account of the petitioner, as a result of which Rs. 1,99,900 were unauthorizedly withdrawn from the bank account of the petitioner. Therefore, in terms of aforenoted clauses of the policy of the Reserve Bank of India, the bank is liable to credit the amount involved in the unauthorized transaction in petitioner's account to the extent of the transactions which took place on 22.02.2019 and 23.02.2019.

13. So far as the transaction which took place on 21.02.2019, we are not expressing any opinion with regard to the liability of the respondent Bank in terms of clause 9 of the aforequoted policy.

14. So far as the closure of complaint of the petitioner by Banking Ombudsman is concerned, we find that the complaint of the petitioner was closed merely on the ground that the ground of complaint do not fall within clause 8 of the Banking Ombudsman Scheme 2006.

15. Perusal of Clause 8 of the Banking Ombudsman Scheme, 2006 shows that it does not cover the controversy as involved in the present writ petition. Therefore, the closure of the complaint by the Banking Ombudsman does not come in the way of the petitioner to get credit of the unauthorized transactions in terms of Clause 9 of the Reserve Bank of India Policy.

16. For the reasons stated above, the writ petition is **partly allowed**.

17. The respondent no. 2 i.e. the Punjab National Bank, Subedarganj, Prayagraj is directed to take action and give credit of the unauthorizedly withdrawn amount to the petitioner in terms of the aforenoted policy of the RBI, expeditiously, preferably within ten days from the date of presentation of a copy of this order.

(2021)06ILR A339
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.03.2021

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE RAVI NATH TILHARI, J.

Writ-C No. 4585 of 2021

Hafiz Naushad Ahmad & Anr. ...Petitioners
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioners:
Shri Mohammad Ali Ausaf, Shri V.K. Singh (Senior Adv.)

Counsel for the Respondents:
C.S.C., A.S.G.I., Shri Manu Vardhana

Indian Succession Act, 1925 - Sections 370, 371, 372, 373 & 374 - Compensation on account of accidental death - Disbursement - D.M. not making payment of compensation on ground petitioners not produced succession certificate - *Held* - parents of deceased cannot be asked to produce succession certificate- Succession certificate can be granted only in respect of "debts" or "securities" to which a deceased was entitled - word "security" as defined in Section 370(2) does not include compensation - there is no requirement to obtain a succession certificate under the provisions of Part X (Sections 370 to 390) of the Indian Succession Act, 1925 to receive compensation amount awarded on account of death of the son of the petitioners (Para 12)

Allowed. (E-4)

List of Cases cited:

1. Rukhsana (Smt) & ors. Vs Nazrunnisa (Smt) & anr. 2000 (9) SCC 240

(Delivered by Hon'ble Surya Prakash Kesarwani, J. & Hon'ble Ravi Nath Tilhari, J.)

1. Heard Sri V.K. Singh, learned Senior Advocate, assisted by Sri Mohd. Ali Ausaf, learned counsel for the petitioners, learned standing counsel for the State - respondents and Sri Manu Vardhana, learned counsel for the respondent no.1.

2. This writ petition has been filed praying for the following relief : -

(a) Issue a writ, order or direction in the nature of mandamus commanding the respondent no.2 to

immediately ensure the payment of amount of compensation of Rs. 60,60,606/- (SR. 3,00,000) alongwith interest thereon as awarded in favour of the petitioners by the Kingdom of Saudi Arabia due to accidental death of his son (Late Mohd. Faize) through cheque No.291792 dated 9.8.2020 in favour of District Magistrate, Mau vide letter dated 11.08.2020 through Embassy of India Riyadh;

(b) Issue a writ, order or direction in the nature of mandamus commanding the respondents to take immediate decision for ensuring/releasing of amount of compensation of Rs. 60,60,606/- (SR. 3,00000/) awarded in favour of the petitioners by the Kingdom of Saudi Arabia due to accidental death of his son (Late Mohd. Faize) through cheque No.291792 dated 9.8.2020 in favour of District Magistrate, Mau vide letter dated 11.08.2020 through Embassy of India Riyadh as requested by the petitioners through applications dated 7.10.2020 and 28.12.2020.

Facts :

3. The petitioners are the parents of their unmarried son late Mohd. Faize who died in Kingdom of Saudi Arabia on 24.08.2019 in a road accident. Salary of the deceased son of the petitioners was remitted by the Embassy of India, Riyadh to the District Magistrate, Mau (India) by a Cheque No.291167 dated 10.09.2019 Rs.26,577/- of State Bank of India. To get payment of the aforesaid salary amount, the petitioner herein obtained a succession certificate dated 03.03.2020 from the court of Civil Judge (Junior Division), Mohammadabad Gohna, Mau. Office of the District Magistrate, Mau also issued a Letter No.145 dated 14.10.2020 certifying that the family of the deceased consists of only the petitioners who are parents of the deceased.

4. Subsequently, the District Magistrate, Mau received a cheque No.291792 dated 09.08.2020 of State Bank of India for Rs.60,60,606/- for compensation in respect of death of the deceased, for making payment to the successors of the deceased. The petitioners being the only successors/ parents of the deceased, have been approaching continuously to the respondent No.3, i.e. the District Magistrate, Mau for release of the payment but the District Magistrate is not making the payment of the aforesaid compensation amount. As per instructions of the respondent No.3 dated 27.02.2021 received by the learned standing counsel, the District Magistrate is not making payment of compensation to the petitioners on the ground that the petitioners have not produced a succession certificate in respect of the aforesaid amount of compensation. It has further been stated in the instructions that guidance has been sought from the State Government for making payment of compensation to the petitioner but guidance has not been received from the State Government.

5. The aforesaid compensation amount was sent by the Embassy of India, Riyadh to the District Magistrate, Mau vide letter dated 11.08.2020, which is reproduced below:

"EMBASSY OF INDIA
RIVADH
REGISTERED POST

No.RIY/CW/436/805/2019
Dated:11.08.2020
District Magistrate
Mau District

Uttar Pradesh, India.

Sub: Payment of legal dues in respect of Late Shri. Mohd Faize

Dear Sir,

Enclosed please find a State Bank of India Cheque No. 291792 dated 09.08.2020 for ***Rs.60,60,606*** *(Rupees Sixty Lakh Sixty Thousand Six hundred Six only) equivalent to* ***SR.3,00000/-*** *pertaining to legal dues and end of service in respect of (late)* ***Shri. Mohd Faize****, who died in Saudi Arabia*

2. The address of the legal heirs of the deceased, according to our records, is as under.

Shri Hafiz Naushad Ahmad,

Flo (Late) ***Shri. Mohd Faize***

R/o, Vill Nagripar, Post Bandikala, Teh Mohammadabad

Gohna, Mau.Dist, Uttar Pradesh, India

3. We shall be grateful if the above amount is disbursed to all the legal heirs after due inquiry/verification and the receipt duly signed by the legal heirs may be returned to this Embassy at the earliest.

4. ***The cheque may kindly be deposited in the official account before its expiry as issue of fresh cheque in lieu is a long drawn procedures, which delay the payment to the legal heirs.***

Copy to:

1.Shri Hafiz Naushad Ahmad, F/o (Late) ***Shri. Mohd Faize****, R/o, Vill Nagripar, Post Bandikala, Teh Mohammadabad Gohna, Mau Dist, Uttar Pradesh, India. You are requested to approach the district authority for collecting the amount.*

2. Ministry of External Affairs, Consular Section, New Delhi

3. The Secretary, (Home Department), Govt. of Uttar Pradesh, Lucknow.

4. Passport Office, Lucknow for making entry regarding cancellation of Passport No.M4260343 dated 09.12.2014 issued to ***Shri. Mohd Faze****.*

(Rajeev Ranjan)

ASO (CW)"

6. The office of the District Magistrate has issued a letter/ certificate no.145 dated 14.10.2020 certifying the successors of the deceased. The aforesaid letter/ certificate dated 14.10.2020 is reproduced below:

"कार्यालय जिलाधिकारी–मऊ।

पत्रांक 1451/ प्रमाण पत्र लि0/मऊ/20 दिनांक 14–10–2020

पारिवारिक विवरण पत्र

(यह प्रमाण पत्र वरासत के मुकदमा, आयकर के लिए प्रयुक्त नहीं होगा)

तहसीलदार मु0बाद की आख्या दिनांक 12.10.2020 के आधार पर प्रमाणित किया जाता है श्री मो. फैजी पुत्र/पुत्री/पत्नी हाफिज नौशाद अहमद ग्राम नगरीपार तहसील. मु0बाद जनपद मऊ की मृत्यु दिनांक 24.8.2019 को हो चुकी है। तहसीलदार मु0बाद की आख्या दिनांक 12.10.2020 के आधार पर उक्त के पारिवारिक सदस्य निम्नलिखित हैः–

क्रमांक	परिवारिक सदस्य	मृतक के सम्बन्ध	आयु	अन्य विवरण
1.	2		3	4
1. हाफिज नौशाद अहमद 2. शाहीन बानो		पिता माता	56 वर्ष 56 वर्ष	

उपरोक्त क्रमांक 1 लगायत 2 के अलावा मृतक के अन्य वारिस नही है।

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नोटः– यह प्रमाण पत्र केवल प्रशासनिक जांच पर आधारित है। न्यायालय में चल रहे वरासत के मुकदमा के लिए यह लागू नहीं होगा। प्रदर्शित विभिन्न कानूनों और अधिनियमों जिसमें की यह अपेक्षा है कि विवादित देयकों भुगतान को प्राप्त करने के लिए जनपद न्यायाधीश द्वारा निर्गत उत्तराधिकार प्रमाण पत्र ही मान्य होगा। उन मामलों में यह प्रमाण पत्र केवल पांच हजार से कम की धनराशि पर ही मान्य होगा। यह प्रमाण पत्र विदेश भेजने के लिए मान्य नहीं है।
प्रभारी अधिकारी प्रमाण पत्र
कृते जिलाधिकारी

7. From the letter of the Embassy dated 11.08.2020, it appears that a clear direction has been issued to the District Magistrate to pay the amount of aforesaid compensation to the legal heirs of the deceased as mentioned in the records of the Embassy, after due inquiry/verification. It appears that due inquiry/ verification has been made, which fact is evident from the letter/ certificate dated 14.10.2020 issued by the office of the District Magistrate, Mau, which has been reproduced above.

8. Aggrieved with the arbitrary action of the respondent no.3 in not disbursing the amount, the petitioners have filed the present writ petition praying for the relief as quoted above.

Discussion and Findings

9. It is undisputed that the petitioners are parents of the deceased. There is no successor other than them as is also evident from the letter/certificate of the office of the District Magistrate, Mau, dated 14.10.2020, which was issued after due inquiry. **As to whether the law required a person to obtain succession certificate to receive an amount of compensation is the basic question involved in the present writ petition.** Yesterday, this case was heard at length and with the consent of learned counsels for the parties, following questions were framed :

(i) Whether under the facts and circumstances of the case particularly in view of the afore-quoted letter of the Embassy dated 11.08.2020 and the letter/ certificate of the office of the respondent No.3 dated 14.10.2020, any succession certificate is required for disbursing the amount of compensation to the petitioners?

(ii) If the answer to the aforesaid question is in affirmative, then under what provision of law, a succession certificate is required under the facts and circumstances of the case?

10. The insistence of learned standing counsel is that under Sections 370 and 374 of the Indian Succession Act, a Succession certificate is required to be obtained to enable the petitioners to get the amount of compensation awarded in respect of the death of their son. We do not find any substance in the submission.

11. Sections 370, 371, 372, 373 and 374 of the Indian Succession Act, 1925 are relevant for the purposes of the present case and, therefore, these Sections are reproduced below :-

370. Restriction on grant of certificates under this part.--*(1) A succession certificate (hereinafter in this Part referred to as a certificate) shall not be granted under this Part with respect to any debt or security to which a right is required by section 212 or section 213 to*

be established by letters of administration or probate:

Provided that nothing contained in this section shall be deemed to prevent the grant of a certificate to any person claiming to be entitled to the effects of a deceased Indian Christian, or to any part thereof, with respect to any debt or security, by reason that a right thereto can be established by letters of administration under this Act.

(2) For the purposes of this Part, "security" means--

(a) any promissory note, debenture, stock or other security of the Central Government or of a State Government;

(b) any bond, debenture, or annuity charged by Act of Parliament [of the United Kingdom] on the revenues of India;

(c) any stock or debenture of, or share in, a company or other incorporated institution;

(d) any debenture or other security for money issued by, or on behalf of, a local authority;

(e) any other security which the [State Government] may, by notification in the Official Gazette, declare to be a security for the purposes of this Part.

***371. Court having jurisdiction to grant certificate**.--The District Judge within whose jurisdiction the deceased ordinarily resided at the time of his death, or, if at that time he had no fixed place of residence, the District Judge, within whose jurisdiction any part of the property of the deceased may be found, may grant a certificate under this Part.*

***372. Application for certificate**.--(1) Application for such a certificate shall be made to the District Judge by a petition signed and verified by or on behalf of the applicant in the manner prescribed by the Code of Civil Procedure, 1908 (5 of 1908) for the signing and verification of a plaint by or on behalf of a plaintiff, and setting forth the following particulars, namely:--*

(a) the time of the death of the deceased;

(b) the ordinary residence of the deceased at the time of his death and, if such residence was not within the local limits of the jurisdiction of the Judge to whom the application is made, then the property of the deceased within those limits;

(c) the family or other near relatives of the deceased and their respective residences;

(d) the right in which the petitioner claims;

(e) the absence of any impediment under section 370 or under any other provision of this Act or any other enactment, to the grant of the certificate or to the validity thereof if it were granted; and

(f) the debts and securities in respect of which the certificate is applied for.

(2) If the petition contains any averment which the person verifying it knows or believes to be false, or does not believe to be true, that person shall be deemed to have committed an offence under section 198 of the Indian Penal Code, 1860 (45 of 1860).

(3) Application for such a certificate may be made in respect of any debt or debts due to the deceased creditor or in respect of portions thereof.

***373. Procedure on application.--(**1) If the District Judge is satisfied that there is ground for entertaining the application, he shall fix a day for the hearing thereof and cause notice of the application and of the day fixed for the hearing--*

(a) to be served on any person to whom, in the opinion of the Judge, special notice of the application should be given, and

(b) to be posted on some conspicuous part of the court-house and published in such other manner, if any, as the Judge, subject to any rules made by the High Court in this behalf, thinks fit,

and upon the day fixed, or as soon thereafter as may be practicable, shall proceed to decide in a summary manner the right to the certificate.

(2) When the Judge decides the right thereto to belong to the applicant, the Judge shall make an order for the grant of the certificate to him.

(3) If the Judge cannot decide the right to the certificate without determining questions of law or fact which seem to be too intricate and difficult for determination in a summary proceeding, he may nevertheless grant a certificate to the applicant if he appears to be the person having prima facie the best title thereto.

(4) When there are more applicants than one for a certificate, and it appears to the Judge that more than one of such applicants are interested in the estate of the deceased, the Judge may, in deciding to whom the certificate is to be granted, have regard to the extent of interest and the fitness in other respects of the applicants.

***374. Contents of certificate.**--When the District Judge grants a certificate, he shall therein specify the debts and securities set forth in the application for the certificate, and may thereby empower the person to whom the certificate is granted--*

(a) to receive interest or dividends on, or

(b) to negotiate or transfer, or

(c) both to receive interest or dividends on, and to negotiate or transfer, the securities or any of them.

12. Bare reading of Sections 370 and 374 of the Act makes it clear that a Succession Certificate can be granted in respect of debts and Securities. The word "security" has been defined in Section 370(2) of the Act which does not include compensation. Therefore, in our considered view there is no requirement to obtain a succession certificate under the provisions of Part X (Sections 370 to 390) of the Indian Succession Act, 1925 to receive compensation amount awarded on account of death of the son of the petitioners.

Disbursement of compensation where there is no dispute of legal representative

13. In the present set of facts there is no dispute that the petitioners are the legal representative of their deceased son being his parents. As a matter of fact the respondent no.3, after conducting some inquiry; has also issued a certificate No.145, dated 14.10.2020, as quoted above, wherein it has been certified that the petitioners are the only members of the deceased's family. Learned counsel for the petitioners have also produced before us a copy of the order dated 27.01.2020, passed by the Chief of the Public Court of Shaqra Province Second Public Circuit, Kingdom of Saudi Arabia, which is kept on record. Perusal of the order shows that the petitioners being legal heirs of their deceased son Mohd. Faize, have filed the claim through their attorney which was adjudicated by the aforesaid court and an order of compensation of 300,000 Saudi Rials was passed to be divided between them being 200,000 Saudi Riyal to the petitioner no.1 and 100,000/- Saudi Riyal to the petitioner no.2. The aforesaid order also considered the certificate issued from the office of the District Magistrate, Mau, dated 17.10.2019. A copy of the aforesaid order dated 17.10.2019, has been produced by the learned counsel for the petitioners, which is kept on record and is reproduced below :-

"कार्यालय जिलाधिकारी -मऊ।
पत्रांक 1343/प्रमाण पत्र लि0/मऊ/19 दिनांक 17-10-2019
पारिवारिक विवरण पत्र
(यह प्रमाण पत्र वरासत के मुकदमा, आयकर के लिए प्रयुक्त नहीं होगा)

तहसीलदार मुहम्मदाबाद गोहना की आख्या दिनांक 15-10-2019 के आधार पर प्रमाणित किया जाता है श्री मु0 फौजी पुत्र नौशाद अमहद ग्राम नगरीपार तहसील मुहम्मदाबाद गोहना जनपद मऊ की मृत्यु दिनांक 24-8-2019 को हो चुकी है। तहसीलदार मुहम्मदाबाद गोहना की आख्या दिनांक 15-10-2019 के आधार पर उक्त के पारिवारिक सदस्य निम्नलिखित हैं-

क्रमांक	पारिवारिक सदस्य	मृतक से सम्बन्ध	आयु	अन्य विवरण
1	2		3	4
(1)	नौशाद अहमद	पिता	57 वर्ष	
(2)	शाहिना बानो	माता	52 वर्ष	

उपरोक्त क्रमांक/लगायत 2 तक के अलावा मृतक का अन्य कोई वारिस नहीं है।

नोट- यह प्रमाण पत्र केवल प्रशासनिक जांच पर आधारित है। न्यायालय में चल रहे वरासत के मुकदमा के लिये यह लागू नहीं होगा। प्रदर्शित विभिन्न कानूनों और अधिनियमों जिसमें की यह अपेक्षा है कि विवादित देयकों भुगतान को प्राप्त करने के लिये जनपद न्यायाधीश द्वारा निर्गत उत्तराधिकार प्रमाण पत्र ही मान्य होगा। उन मामलों में यह प्रमाण पत्र केवल पांच हजार से कम की धनराशी पर ही मान्य होगा। यह प्रमाण पत्र विदेश भेजने के लिये मान्य नहीं है।
सील अपठनीय
ह0 अपठनीय
प्रभारी अधिकारी (प्रमाण पत्र)
कृते जिलाधिकारी
मऊ।"

14. Perusal of the aforesaid order dated 17.10.2019 shows that it was issued by the office of District Magistrate, Mau, after obtaining an inquiry report dated 15.10.2019, with regard to the family members and it was found that the petitioners being father and mother are the only family members of the deceased Mohd. Faize. Thus, it is undisputed that after due inquiry the respondent no.3 has found the petitioners to be the heirs and legal representatives of their deceased son Mohd. Faize and on that basis the order dated 27.01.2020 was passed by the Chief of the Public Court of Shaqra Province Second Public Circuit, Kingdom of Saudi Arabia, granting compensation to the petitioners in the ratio as aforementioned. On receipt of the Cheque of compensation of Rs. 60,60,606/- the District Magistrate, Mau, again conducted some inquiry and issued an order dated 14.10.2020 after obtaining inquiry report dated 12.12.2020 and certified that the petitioners being father and mother of the deceased, are the only family members of the deceased. Thus, the respondent no.3 i.e. the District Magistrate, Mau, must have disbursed the amount to the petitioners but for the reasons best known to him he withheld the disbursement of the amount on one pretext or the other.

Whether for compensation of present nature a succession certificate is required

15. We have already held that compensation is neither a debt nor security and, therefore, the provisions of part X of the Indian Succession Act, 1925, shall not apply in matters of compensation. We are also fortified by the decision of Hon'ble Supreme Court in the case of **Rukhsana (Smt) and Ors. Vs. Nazrunnisa (Smt) and Anr., 2000 (9) SCC 240,** in which Hon'ble Supreme Court considered similar facts and held as under :-

"3. We cannot approve the said view of the High Court, for, Succession Certificate as envisaged in the Indian Succession Act can be granted only in respect of "debts" or "securities" to which a deceased was entitled. The amount involved in this case was not a debt or security to which the deceased was entitled. This was a compensation sanctioned on account of the death of the deceased and is, therefore, not an asset belonging to the deceased but an amount which the legal representatives of the deceased can claim on their own account. The civil court will only decide as to who are the legal representatives and in what shares they are entitled to as per the Personal Law applicable to them. The Parties will move appropriate application before the court concerned for expediting the procedure regarding disbursement of the amount. With these observations we set aside the impugned order."

16. For the reasons aforestated, we find that the District Magistrate, Mau, is bound to disburse the amount of compensation to the petitioners who are the legal heirs and representatives of the deceased Mohd. Faize. Therefore, we direct the respondent no.3 to disburse the amount of compensation forthwith. Petitioners are granted liberty to move an application before the respondent no.3 for payment of interest for the period the aforesaid amount of compensation has been illegally withheld by the respondent no.3. In the event such an application is filed by the petitioners within four months alongwith a copy of this order, the respondent no.3 shall pass an appropriate order in accordance with law within next three weeks and if any amount of interest is found to be due and payable, the same shall be paid by the respondent no.3 to the petitioners within next three weeks.

17. **Writ petition is allowed to the extent indicated above.**

(2021)06ILR A346
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.03.2021

BEFORE

THE HON'BLE PANKAJ NAQVI, J.
THE HON'BLE PIYUSH AGRAWAL, J.

Writ-C No. 12462 of 2020

M/s Rajhans Infratech Pvt. Ltd.
...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Shri Amarendra Nath Singh, Sri Uma Nath Pandey, Sri Anil Kumar Chobey

Counsel for the Respondents:
C.S.C., Anjali Upadhya, Sri Ramendra Pratap Singh, Alok Singh

U.P. Industrial Area Development Act, 1976 - "Zero Period" - authority framed policy dated 1.1.2016 for granting benefit of "Zero Period" - it provides that in the event an allottee is unable to take actual physical possession of the demised area on account of encroachment or a pending

dispute - authority is entitled to waive lease rent, interest and penal interest thereon for a definite period (Para 2)

Plot of the petitioner was inaccessible from 27.4.2010 to 15.5.2015, on account of encroachment & in absence of any approach road, preventing the petitioner from raising any constructions - *Held* - petitioner liable to be granted benefit of zero period from 27.4.2010 to 15.5.2015 in view of policy dated 1.1.2016 - authority cannot take advantage of its own wrong i.e. by not providing the complete physical possession of the allotted plot to the petitioner and at the same time, levying additional changes for not completing the constructions within a stipulated period (Para 8,9)

Allowed. (E-4)

(Delivered by Hon'ble Pankaj Naqvi, J. & Hon'ble Piyush Agrawal, J.)

Heard Sri Uma Nath Pandey, learned counsel for the petitioner, Sri Ramendra Pratap Singh, learned counsel for respondent nos. 2 & 3 and the learned standing counsel.

1. A consortium of 4 real estate developers was allotted by Greater Noida Industrial Development Authority (GNIDA), plot no. GH-06 Sector -1, Greater Noida, area 738000 sq. mtrs. For a group housing on 27.4.2010. The consortium was permitted under the order of authority dated 24.3.2011 for sub-division of the said plot. Plot no. GH-06-B (area 20000 sq. mtr) was allotted to the petitioner, one of the 4 members of the consortium, after sub-division. The order of sub-division indicated that petitioner was granted 24 mtr. wide approach road to access his plot. A lease deed dated 27.5.2011 in respect of 17,728.40 sq. mtrs. and a supplementary lease dated 1.7.2013 for area 2306.4 sq. mtrs came to be executed for 90 years in favour of the petitioner. It is alleged that petitioner could access his plot only through Khasra Nos. 663 & 654 which were under litigation as there was an order of status quo, as a result of which actual physical possession in respect of above khasra could not be delivered till 14.5.2015 when the same was removed with police aid.

2. The authority has framed a policy dated 1.1.2016 for granting benefit of "Zero Period" which provides that in the event an allottee is unable to take actual physical possession of the demised area on account of encumbrance or encroachment or a pending dispute, the authority is entitled to waive lease rent, interest and penal interest thereon for a definite period. In the present case, "Zero Period", was alleged from 27.4.2010 to 15.5.2015. The petitioner staked a claim for Zero Period on 18.4.2016 which came to be rejected on 22.3.2018 which the petitioner claims was never communicated to him and claims to have learnt about it on 2.7.2018, when it was challenged in Writ C No. 23624/2019. The said writ petition came to be disposed of on 6.8.2019 directing the petitioner to approach the State Government. The revision preferred by the petitioner came to be disposed of by the State Government on 17.3.2020 for fresh consideration in the light of resolution of the 104th Board Meeting. Pursuant thereto, the authority rejected the claim on 9.7.2020, impugned herein.

3. Learned counsel for the petitioner challenges the order dated 9.7.2020 on the following grounds:-

(i) Plot of the petitioner was inaccessible from 27.4.2010 to 15.5.2015, in the absence of any approach road,

preventing the petitioner from raising any constructions.

(ii) Petitioner was entitled to parity from others who had been granted benefit of zero period.

(iii) Case of petitioner is squarely covered under the terms and conditions as contained in the policy dated 1.1.2016.

4. Learned counsel for the authority opposed the submissions on the premise that the sub-division of the plot was carried out by the petitioner and other members of consortium knowing fully well the location of its plot and the approach road after sub-division. No case for parity as the ground situation is absolutely different qua the petitioner. Once the case of the petitioner has been considered in the light of parameters provided under the G.O. dated 1.1.2016, this Court under Article 226 is prohibited to act as a court of appeal.

5. The GNIDA is an authority constituted under Section 3 of the U.P. Industrial Area Development Act, 1976. The object of the authority shall be to secure the planned development of the industrial development areas.

6. From the perusal of the policy dated 1.1.2016 (Page-129-130 of the petition), it appears that following conditions have been laid down for the grant of benefit of Zero Period:-

(i) If for some reason, the authority is unable to deliver possession to the allottee or developer.

(ii) The authority is unable to deliver possession to the allottee / developer as the same could disturb the peace and tranquility of the area or there is an encroachment as a result of which development is unable to proceed.

(ii) Execution of allotment / lease / delivery of possession is unable to take place in view of pending interim order of a court.

(iv) Lease deed is unable to be executed on account of G.O or a decision of the Board.

(v) If the authority has delivered possession to the allottee and the lease deed executed but the allottee in unable to access the plot as a result of which development is impossible to commence, the allottee is entitled to the benefit of zero period upto the date on which alternate access is provided.

7. The petitioner, one of the four members of the consortium, was allotted plot no. GH-06-B after the authority had consented for sub-division under the order dated 24.3.2011. The authority is a signatory to the sub-division. Although 24 mtrs. wide approach road was assigned to the petitioner under the order of sub-division, no approach road whatsoever was actually provided to the petitioner till 15.5.2015 which is an admitted fact. It could not be disputed that in the absence of any approach road, construction at the assigned plot was impossible. The authority being a signatory to the order of sub-division, cannot feign ignorance on the ground that it was an internal matter of the consortium. The authority being an instrumentality of a State, was obliged to act reasonably and fairly by providing actual physical possession of the approach road over khasra no. 663 & 654 to the petitioner which was under unauthorized possession coupled with the fact that not only the said fact was admitted to the petitioner but also it delivered the possession of this area to the petitioner after removing encroachment with the aid of police only on 15.5.2013.

8. We, in the light of above discussion, are of the considered view that the petitioner was liable to be granted benefit of zero period from 27.4.2010 to 15.5.2015 in view of Clause-5 of the policy dated 1.1.2016 as inserted by the resolution of Board Meeting dated 14.3.2016. Once the case of petitioner is found to be successful on merits of the terms and conditions of the policy and 104th Board Resolution, we do not feel the necessity to enter into the claim of parity.

9. The impugned order suffers from absolute non-application of mind as it was not only admitted case that there was encroachment over khasra nos. 663 & 654 on which 24 mts. wide approach road was granted to the petitioner but on account of encroachment, possession of the same could be delivered with the police aid only on 15.5.2015 coupled with the fact that its case was also not considered as per the 104th Board Resolution. We are also of the view that the authority cannot take advantage of its own wrong i.e. by not providing the complete physical possession of the allotted plot to the petitioner and at the same time, levying additional changes for not completing the constructions within a stipulated period. This approach would not only be counter productive rather deterimental to the industrial development of the area. We, thus, have no option but to set aside the order dated 9.7.2020.

10. The writ petition is **allowed**. The order dated 9.7.2020 is set aside/quashed. The competent authority is directed to consider the case of the petitioner for grant of benefit of zero period w.e.f. 27.4.2010 to 15.5.2015, as expeditiously as possible, preferably within 6 weeks, from the the date of receipt of this order, in the light of observation made above and in accordance with law, under intimation to the petitioner.

(2021)06ILR A349
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.06.2021

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE RAVI NATH TILHARI, J.

Writ-C No. 27346 of 2020

Kanhaiya Lal Srivastava ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Suresh Chandra Dwivedi

Counsel for the Respondents:
C.S.C.

A. Criminal Law - Criminal Procedure Code (2 of 1974) – Section 197 - Prosecution of public servants- *"while acting or purporting to act in discharge of their official duty"* - Protection when - An accused public servant has to show that there is reasonable connection between the act complained of and the discharge of official duty - act of the accused complained of must be such that the same cannot be separated from the discharge of official duty - where there is no reasonable connection between the act complained of and the performance of official duties, no sanction under Section 197, Cr.P.C. would be required - where a criminal act is performed under the colour of authority but which in reality the act is for the public servant's own pleasure or benefit, then such acts are not protected under the doctrine of State immunity - such claim an be examined during the course of trial by giving opportunity to the defence to establish it [Para 31 (viii), (ix)]

B. Prevention of Corruption Act (49 of 1988) – Section 19 - Criminal Procedure Code (2 of 1974), S.197 - Sanction to prosecute - prosecution must send the entire relevant record to the sanctioning authority - prosecution has to satisfy court, by leading evidence, that at the time of sending the matter for grant of sanction by the competent authority, adequate material for such grant was made available to the said authority - court has to find out whether there has been an application of mind on the part of the sanctioning authority concerned on the material placed before it - adequacy of material placed before the sanctioning authority cannot be gone into by the court as it does not sit in appeal over the sanction order - Grant of sanction is only an administrative function and the sanctioning authority is required to prima facie reach the satisfaction that relevant facts would constitute the offence (Para 25)

C. Prevention of Corruption Act (49 of 1988)- Section19 - challenge to order granting sanction for prosecution - Constitution of India, Art.226 - Writ petition - Maintainability - order granting sanction for prosecution, is ordinarily not maintainable under Article 226 - accused public servant has an opportunity before the court, i.e. Special Judge appointed under Section 3 of the P.C. Act to raise objection to the grant of sanction for prosecution - legality and/ order validity of the order granting sanction would be subject to review by the criminal courts [Para 31(iii), (vi)]

D. Prevention of Corruption Act (49 of 1988)- Section 19 - Question of sanction - Stage - Question of sanction may arise at any stage of proceedings - Ordinarily, question of sanction should be dealt with at the stage of taking cognizance - but if the cognizance is taken erroneously & the same comes to the notice of the court at a later stage, finding to that effect is permissible & such a plea can be raised at the time of framing of charges - Objection can be raised even before the appellate court. [Para 31(v)]

E. Prevention of Corruption Act (49 of 1988)- Section 19 - challenge to order granting sanction for prosecution - Constitution of India, Art.226 - Writ petition - Necessary party - complainant is the necessary party [Para 31 (vii)]

F. Prevention of Corruption Act (49 of 1988)- Section 19 - Constitution of India, Art.226 - Writ petition - Maintainability - an order refusing to grant sanction may attract judicial review [Para 31(iii)]

Held - since the chargesheet already submitted in the court and cognizance has also been taken - writ petition for quashing the sanction for prosecution or to stay the trial is not maintainable (Para 16)

Dismissed. (E-4)

List of Cases cited:

1. St. of Pun. & anr. Vs Mohd. Iqbal Bhatti (2009) 17 SCC 92

2. St. of H.P. Vs Nishant Sareen (2010) 14 SCC 527

3.Gopikant Choudhary Vs St. of Bihar (2000) 9 SCC 53

4.Ashoo Surendranath Tewari Vs The Dy Sup. of Police, EOW, CBI & anr. (2020) 9 SCC 636

5. Devinder Singh & ors. Vs St. of Pun. through CBI (2016) 12 SCC 87

6. Chittranjan Das Vs St. of Ori (2011) 7 SCC 167

7. Prakash Singh Badal & anr. Vs St. of Pun., (2007) 1 SCC 1

8. Asian Resurfacing of Road Agency Pvt. Ltd. & anr. Vs CBI (2018) 16 SCC 299

9. Vinod Kumar Garg Vs State (Government of NCT of Delhi), (2020) 2 SCC 88

10. CBI Vs Ashok Kumar Aggarwal (2014) 14 SCC 295

11. St. of Maha Vs Mahesh G. Jain, (2013) 8 SCC 119

12. Romesh Lal Jain Vs Naginder Singh Rana & ors. (2006) 1 SCC 294

13.SHO, CBI/ ACB/ Bengalore Vs B.A. Srinivasan & anr., (2020) 2 SCC 153

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

1. Heard Sri Suresh Chandra Dwivedi, learned counsel for the petitioner and the learned standing counsel for the State-respondents.

2. This writ petition has been filed praying for the following relief:

"(i) To issue a writ of Certiorari quashing the order dated passed 27.01.2020 passed by respondent no.3 and 4 (Containing in Annexure no.33 in present writ petition).

(ii) To issued a stay operation of the order dated 27.01.2020 (Annexure No.33) and it further prayed during the pendency of writ petition the trial court has not proceed the matter inpursuance of order dated 27.01.2020 during the pendency of writ petition.

(iii) Issue a writ order or direction in the nature of Mandamus Commanding / Directing the Respondents to act in accordance with law.

(iv) Issue any other suitable writ order or direction as this Hon'ble Court may deem fit and proper in the circumstances of the case.

(v) Award the cost of petition to the petitioner."

Facts:-

3. Briefly stated facts of the present case are that in the year 2015, the petitioner was selected on the post of Treasury Officer and was posted as Finance and Accountants Officer in the Basic Education Department, Agra. Sometime in August, 2016, one Dinesh Singh Chahar was suspended by the competent authority and disciplinary proceeding was initiated but his disciplinary proceeding could not be concluded within three months, therefore, on 25.12.2016, he moved an application before the petitioner and the concerned Basic Education Officer for payment of suspension allowance to the extent of 75% of the salary instead of 50% of the salary which the petitioner forwarded to the Basic Education Officer for orders. On complaint of the aforesaid suspended Assistant Teacher against the petitioner for demanding illegal gratification, Vigilance Department constituted a team of officers. On 02.05.2017, the petitioner was allegedly caught red handed by the Trap Team of Officers of the U.P. Vigilance Department when he was allegedly accepting bribe of Rs.50,000/- from the Assistant Teacher Sri Dinesh Singh Chahar, for payment of his suspension allowance. Accordingly, a First Information Report No.0254 of 2017 dated 02.05.20217 under Section 7, 13(1)(d), 13(2), P.C. Act, P.S. Shahganj, District Agra was registered against the petitioner.

4. On 15.05.2017, petitioner's wife submitted a representation before the District Magistrate, Agra, alleging that her husband has been falsely implicated in the aforesaid criminal case. On 13.11.2017, the petitioner also moved a representation before the Superintendent of Police, Vigilance, Agra submitting that he has been falsely implicated. On 21.11.2017, the petitioner moved a representation before the Finance Controller, Basic Shiksha

Parishad, U.P. Allahabad alleging that the Assistant Teacher Dinesh Singh Chahar had made a false complaint against him. The petitioner also moved a representation before the Additional Director (Basic Shiksha), Uttar Pradesh, Allahabad for action against the aforesaid Assistant Teacher Dinesh Singh Chahar alleging that he moved a false complaint since the sanctioning authority for suspension allowance to the extent of 75% of the salary, was the Basic Education Officer and not the petitioner. On the aforesaid representation of the petitioner, the Finance Controller issued a letter dated 08.12.2017 for taking action against the aforesaid suspended Assistant Teacher Dinesh Singh Chahar.

5. It appears that the Investigating Officer of the Vigilance Department investigated the matter and requested the State Government to grant sanction for prosecution of the petitioner. It appears that the State Government considered the objections/ representation of the petitioner and vide order dated 25.04.2018, the State Government not accepted the recommendation of the Vigilance Department for granting sanction for prosecution of the petitioner and directed for further investigation to be carried by the CBCID under Section 173(8), Cr.P.C. in the aforesaid Case Crime No.0254 of 2017.

6. Aggrieved with the aforesaid order dated 25.04.2018, the aforesaid Assistant Teacher Sri Dinesh Singh Chahar filed a Criminal Misc. Writ Petition No.12373 of 2018 (Dinesh Singh Chahar vs. State of U.P. and others) praying to quash the order dated 25.04.2018. The aforesaid Criminal Misc. Writ Petition No.12373 of 2018 was disposed of by a Division Bench of this Court by order dated 11.10.2018 observing as under:

"12. In these circumstances, we do not find any ground to quash the impugned order dated 25.04.2018. It may also be mentioned here that in further investigation as directed by the Government vide impugned order to be done by C.B.C.I.D. there could be possibility of reiteration of the charge-sheet submitted against the respondent no.7 and there could also be a possibility of closer report being submitted. In case, the closer report is submitted, the competent court may be approached by the petitioner to get the same set aside by moving a protest petition and at that stage, the said court may also take into consideration earlier evidence gathered by the Investigating Agency during submission of the Charge-sheet against the petitioner before arriving on a conclusion.

13. In view of the above, ***we uphold the impugned order dated 25.04.2018 and direct to the Investigating Agency to conclude the further investigation within a period of two months from today, positively and submit the police report before the competent court.***

14. The present writ petition is, accordingly, disposed of."

7. In the aforesaid Criminal Misc. Writ Petition No.12373 of 2018, the petitioner was the respondent No.7. The aforesaid order of the State Government dated 25.04.2018 directing for further investigation by the CBCID, has attained finality. The CBCID completed the investigation and submitted reports dated 27.05.2019 and 08.07.2019 to the State Government. Vide letters dated 14.01.2020 and 23.01.2020, the State Government made certain queries and directed CBCID to provide detail investigation report. After considering the matter, the State Government passed the impugned order dated 27.01.2020 granting sanction for

prosecution of the petitioner under Section 7/13(1)(d), 13(2), P.C. Act.

8. In the impugned order dated 27.01.2020, the Case Crime No. was inadvertently mentioned as 25417/2017 instead of correct No.254/2017. Therefore, the impugned order dated 27.01.2020 was corrected. The **chargesheet No.3/2020 dated 03.03.2020 has been filed before the Court of Additional District and Sessions Judge/ Special Judge, Prevention of Corruption Act, Meerut on 29.07.2020**. It has been stated in paragraph-10 of the short counter affidavit that in the aforesaid case (State Trial No.432 of 2020), cognizance has been taken and it is pending before the court of Special Judge, Prevention of Corruption Act, Meerut and the next date is fixed for 09.04.2021.

Submissions:-

9. **Learned counsel for the petitioner** submitted as under:-

(i) Once the request for sanction for prosecution of the petitioner was rejected by the State Government vide order dated 25.04.2018, the impugned order dated 27.01.2020 granting sanction could not have been passed by the State Government on the basis of the same material on which the sanction was earlier refused.

(ii) When the impugned order dated 27.01.2020 granting sanction for prosecution was passed, the investigation of the case was not complete.

(iii) The petitioner has been falsely implicated as evident from representations made by the petitioner. Therefore, the grant of sanction for prosecution by the impugned order dated 27.01.2020 is arbitrary and illegal. While granting sanction for prosecution, the State Government has not considered the letter of the Finance Controller dated 08.12.2017 whereby he ordered for taking action against the Assistant Teacher Sri Dinesh Singh Chahar for levelling charges against the petitioner.

(iv) The petitioner was not the sanctioning authority to sanction suspension allowance to the extent of 75% of the salary of the aforesaid Assistant Teacher. The petitioner was only the disbursing authority. Therefore, there was no occasion for the petitioner to demand and accept illegal gratification from the aforesaid Assistant Teacher Sri Dinesh Singh Chahar. Consequently, the entire case set up by The Trap team is baseless.

(v) The Investigating Officer has not conducted investigation truthfully and fairly. Therefore, the grant of sanction for prosecution on the basis of the investigation report of the CBCID, deserves to be quashed.

(vi) The alleged trap was made with malicious intention only for destroying carrier of the petitioner in conspiracy with the complainant Dinesh Singh Chahar.

10. In support of his submissions, learned counsel for the petitioner has relied upon the judgments of Hon'ble Supreme Court in the case of **State of Punjab and another Vs. Mohd. Iqbal Bhatti, (2009) 17 SCC 92, State of Himanchal Pradesh vs. Nishant Sareen, (2010) 14 SCC 527, Gopikant Choudhary vs. State of Bihar, (2000) 9 SCC 53 and Ashoo Surendranath Tewari vs. The Deputy Superintendent of Police, EOW, CBI and another (2020) 9 SCC 636** for the proposition that the State Government has no power to review its own order in the matter of grant of sanction, on the same set of facts on which the sanction for prosecution was earlier refused.

11. **Learned standing counsel has supported the impugned order** and has

also relied upon a judgment of Hon'ble Supreme Court in the case of **Devinder Singh and others vs. State of Punjab through CBI, (2016) 12 SCC 87 (para-39).**

Discussion and Findings:-

12. We have carefully considered the submissions of the learned counsels for the parties.

13. Before we proceed to discuss, it would be appropriate to reproduce Section 19 of The Prevention of Corruption Act, 1988 (hereinafter referred to as "P.C. Act'), as under:

"19. Previous sanction necessary for prosecution.--(1) No court shall take cognizance of an offence punishable under sections 7, 10, 11, 13 and 15 alleged to have been committed by a public servant, except with the previous sanction,-

(a) in the case of a person who is employed in connection with the affairs of the Union and is not removable from his office save by or with the sanction of the Central Government, of that Government;

(b) in the case of a person who is employed in connection with the affairs of a State and is not removable from his office save by or with the sanction of the State Government, of that Government;

(c) in the case of any other person, of the authority competent to remove him from his office.

(2) Where for any reason whatsoever any doubt arises as to whether the previous sanction as required under sub-section (1) should be given by the Central Government or the State Government or any other authority, such sanction shall be given by that Government or authority which would have been competent to remove the public servant from his office at the time when the offence was alleged to have been committed.

(3) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),--

(a) no finding, sentence or order passed by a special Judge shall be reversed or altered by a Court in appeal, confirmation or revision on the ground of the absence of, or any error, omission or irregularity in, the sanction required under sub-section (1), unless in the opinion of that court, a failure of justice has in fact been occasioned thereby;

(b) no court shall stay the proceedings under this Act on the ground of any error, omission or irregularity in the sanction granted by the authority, unless it is satisfied that such error, omission or irregularity has resulted in a failure of justice;

(c) no Court shall stay the proceedings under this Act on any other ground and no court shall exercise the powers of revision in relation to any interlocutory order passed in any inquiry, trial, appeal or other proceedings.

(4) ***In determining under sub-section (3) whether the absence of, or any error, omission or irregularity in, such sanction has occasioned or resulted in a failure of justice, the court shall have regard to the fact whether the objection could and should have been raised at any earlier stage in the proceedings.***

Explanation.--For the purposes of this section,--

(a) error includes competency of the authority to grant sanction;

(b) a sanction required for prosecution includes reference to any requirement that the prosecution shall be at the instance of a specified authority or with

the sanction of a specified person or any requirement of a similar nature."

14. Perusal of Section 19 of the P.C. Act makes it clear that no court shall take cognizance of an offence punishable under Sections 7, 10, 11, 13 and 15 alleged to have been committed by a public servant, except with the previous sanction of the Central Government or the State Government or the competent authority as referred in clauses (a), (b) and (c) of sub-Section (1). Clause (b) of sub-Section (3) of Section 19 mandates that no court shall stay the proceeding under this Act on the ground of any error, omission or irregularity in the sanction granted by the authority unless it is satisfied that such error, omission or irregularity has resulted in a failure of justice. Sub-section (4) of Section 19 explains the phrase "failure of justice".

Object of Section 19 of the P.C. Act and Maintainability of Writ Petition challenging the order granting Sanction for Prosecution:-

15. Section 19 of the P.C. Act leaves no manner of doubt that sanction for prosecution has been provided by law as a safeguard to public servants to save them from vexatious and frivolous prosecution so as to give them freedom and liberty to perform their duty without fear or favour and not succumbed to the pressure of unscrupulous elements. Thus, Section 19 of the P. C. Act empowers the sanctioning authority to protect the innocent public servants from uncalled for prosecution but it is not intended to shield the guilty, vide **Chittranjan Das vs. State of Orrisa, (2011) 7 SCC 167 (para-12).**

16. From bare reading of Section 19 read with Section 3, 4 and 5, it is evident that **legality and/ or validity of order granting sanction would be subject to review by criminal courts** whereas an order refusing to grant sanction may attract judicial review. Reference in this regard may also be had to the judgment of the Apex Court in **State of Punjab and another vs. Mohd. Iqbal Bhatti, (2009) 17 SCC 92 (para-6)**. In the present set of facts, since the chargesheet dated 03.03.2020 has already been submitted in the court of Additional Sessions Judge/ Special Judge, P.C. Act on 29.07.2020 and the cognizance has also been taken in State Trial No.432 of 2020, therefore, **present writ petition for quashing the sanction for prosecution or to stay the trial is not maintainable.** Ordinarily, question of sanction should be dealt with at the stage of taking cognizance. Question of sanction can be raised at the time of framing of charge and it can be decided *prima facie* on the basis of accusation. Question of sanction may arise at any stage of proceedings. Whether sanction for prosecution is necessary or not, have to be determined from stage to stage and material brought on record depending upon facts of each case.

17. Earlier a Criminal Misc. Writ Petition No.12373 of 2018 was filed by the complainant Sri Dinesh Singh Chahar in which the petitioner herein was the respondent No.7. In that writ petition, the order dated 25.04.2018 directing further investigation by CBCID was challenged and the writ petition was disposed of by order dated 11.10.2018 upholding the order dated 25.04.2018 and directing the Investigating Agency to conclude the further investigation within a period of two months, positively and submit the police report before the competent court. The order dated 11.10.2018 has attained finality. That apart, the petitioner has not impleaded the complainant in the present

writ petition who is the necessary party. Thus, the writ petition also suffers from defect of non-joinder of necessary party.

Law of Sanction for Prosecution, and Stage and Forum to challenge an order granting sanction:-

18. Law with regard to order for sanction for prosecution and when the question of sanction can be entertained, has been summarised by Hon'ble Supreme Court in the case of **Devinder Singh vs. State of Punjab through CBI, (2016) 12 SCC 87 (para-39)**, as under:

*"**39**. The principles emerging from the aforesaid decisions are summarized hereunder :*

***39.1**. Protection of sanction is an assurance to an honest and sincere officer to perform his duty honestly and to the best of his ability to further public duty. However, authority cannot be camouflaged to commit crime.*

***39.2**. Once act or omission has been found to have been committed by public servant in discharging his duty it must be given liberal and wide construction so far its official nature is concerned. Public servant is not entitled to indulge in criminal activities. To that extent Section 197 CrPC has to be construed narrowly and in a restricted manner.*

***39.3**. Even in facts of a case when public servant has exceeded in his duty, if there is reasonable connection it will not deprive him of protection under section 197 Cr.P.C. There cannot be a universal rule to determine whether there is reasonable nexus between the act done and official duty nor it is possible to lay down such rule.*

***39.4**. In case the assault made is intrinsically connected with or related to performance of official duties sanction would be necessary under Section 197 CrPC, but such relation to duty should not be pretended or fanciful claim. The offence must be directly and reasonably connected with official duty to require sanction. It is no part of official duty to commit offence. In case offence was incomplete without proving, the official act, ordinarily the provisions of Section 197 CrPC would apply.*

***39.5.** In case sanction is necessary, it has to be decided by competent authority and sanction has to be issued on the basis of sound objective assessment. The court is not to be a sanctioning authority.*

***39.6**. **Ordinarily, question of sanction should be dealt with at the stage of taking cognizance, but if the cognizance is taken erroneously and the same comes to the notice of Court at a later stage, finding to that effect is permissible and such a plea can be taken first time before appellate Court.** It may arise at inception itself. There is no requirement that accused must wait till charges are framed.*

***39.7**. **Question of sanction can be raised at the time of framing of charge** and it can be decided prima facie on the basis of accusation. It is open to decide it afresh in light of evidence adduced after conclusion of trial or at other appropriate stage.*

39.8. Question of sanction may arise at any stage of proceedings**. On a police or judicial inquiry or in course of evidence during trial. Whether sanction is necessary or not may have to be determined from stage to stage and material brought on record depending upon facts of each case. Question of sanction can be considered at any stage of the proceedings. Necessity for sanction may reveal itself in the course of the progress of the case and **it would be open to accused to place material during

the course of trial for showing what his duty was. Accused has the right to lead evidence in support of his case on merits.

39.9*. In some cases it may not be possible to decide the question effectively and finally without giving opportunity to the defence to adduce evidence. Question of good faith or bad faith may be decided on conclusion of trial."*

(Emphasis supplied by us)

19. In the case of **Mohd. Iqbal Bhatti** (supra), Hon'ble Supreme Court held as under:

*".....**The legality and/or validity of the order granting sanction would be subject to review by the criminal courts**. An order refusing to grant sanction may attract judicial review by the Superior Courts."*

20. In the case of **Prakash Singh Badal and another vs. State of Punjab, (2007) 1 SCC 1 (Paras-20, 21, 26, 29, 48)**, Hon'ble Supreme Court held as under:

*"20. The principle of immunity protects all acts which the public servant has to perform in the exercise of the functions of the Government. The purpose for which they are performed protects these acts from criminal prosecution. However, there is an exception. **Where a criminal act is performed under the colour of authority but which in reality is for the public servant's own pleasure or benefit then such acts shall not be protected under the doctrine of State immunity.***

*21. In other words, where the act performed under the colour of office is for the benefit of the officer or for his own pleasure Section 19(1) will come in. Therefore, **Section 19(1) is time and offence related**.*

26. The underlying principle of Sections 7, 10, 11, 13 and 15 have been noted above. Each of the above Sections indicate that the public servant taking gratification (Section 7), obtaining valuable thing without consideration (Section 11), committing acts of criminal misconduct (Section 13) are acts performed under the colour of authority but which in reality are for the public servant's own pleasure or benefit. Sections 7, 10, 11, 13 and 15 apply to aforestated acts. Therefore, if a public servant in his subsequent position is not accused of any such criminal acts then there is no question of invoking the mischief rule. Protection to public servants under Section 19(1)(a) has to be confined to the time related criminal acts performed under the colour or authority for public servant's own pleasure or benefit as categorized under Sections 7, 10, 11, 13 and 15. This is the principle behind the test propounded by this court, namely, the test of abuse of office.

29. The effect of sub-sections (3) and (4) of Section 19 of the Act are of considerable significance. In Sub-Section (3) the stress is on "failure of justice" and that too "in the opinion of the Court". In sub-section (4), the stress is on raising the plea at the appropriate time. Significantly, the "failure of justice" is relatable to error, omission or irregularity in the sanction. Therefore, mere error, omission or irregularity in sanction is considered fatal unless it has resulted in failure of justice or has been occasioned thereby. Section 19(1) is a matter of procedure and does not go to root of jurisdiction as observed in para 95 of the Narasimha Rao's case [(1998) 4 SCC 626]. Sub-section (3)(c) of Section 19 reduces the rigour of prohibition. In Section 6(2) of the Old Act [Section 19(2) of the Act] question relates

to doubt about authority to grant sanction and not whether sanction is necessary.

*48. ..... There is a distinction between the **absence of sanction** and the alleged **invalidity on account of non-application of mind**. The former question can be agitated at the threshold but **the latter is a question which has to be raised during trial**."*

21. In the case of **Asian Resurfacing of Road Agency Pvt. Ltd. and another vs. Central Bureau of Investigation, (2018) 16 SCC 299 (paras-50 and 54)**, Hon'ble Supreme Court held has under:

"50. A perusal of Section 19(3) of the Act would show that the interdict against stay of proceedings under this Act on the ground of any error, omission or irregularity in the sanction granted by the authority is lifted if the Court is satisfied that the error, omission or irregularity has resulted in a failure of justice. Having said this in clause (b) of Section 19(3), clause (c) says that no Court shall stay proceedings under this Act on any other ground. The contention on behalf of the Appellants before us is that the expression "on any other ground" is referable only to grounds which relate to sanction and not generally to all proceedings under the Act. Whereas learned counsel for the Respondents argues that these are grounds referable to the proceedings under this Act and there is no warrant to add words not found in sub-section (c), namely, that these grounds should be relatable to sanction only.

54. It is thus clear that the inherent power of a Court set up by the Constitution is a power that inheres in such Court because it is a superior court of record, and not because it is conferred by the Code of Criminal Procedure. This is a power vested by the Constitution itself, inter alia, under Article 215 as aforestated. Also, as such High Courts have the power, nay, the duty to protect the fundamental rights of citizens under Article 226 of the Constitution, the inherent power to do justice in cases involving the liberty of the citizen would also sound in Article 21 of the Constitution. This being the constitutional position, it is clear that Section 19(3)(c) cannot be read as a ban on the maintainability of a petition filed before the High Court under Section 482 of the Code of Criminal Procedure, the non-obstante clause in Section 19(3) applying only to the Code of Criminal Procedure. The judgment of this Court in Satya Narayan Sharma v. State of Rajasthan, (2001) 8 SCC 607, paras 14 and 15 does not, therefore, lay down the correct position in law. Equally, in paragraph 17 of the said judgment, despite the clarification that proceedings can be "adapted" in appropriate cases, the Court went on to hold that there is a blanket ban of stay of trials and that, therefore, Section 482, even as adapted, cannot be used for the aforesaid purpose. This again is contrary to the position in law as laid down hereinabove. This case, therefore, stands overruled."

22. The principles laid down in the case of **Mahesh G Jain** (supra) has been reiterated by Hon'ble Supreme Court in a recent judgment in the case of **Vinod Kumar Garg vs. State (Government of NCT of Delhi), (2020) 2 SCC 88 (paras-24 and 25).**

23. In the case of **Central Bureau of Investigation vs. Ashok Kumar Aggarwal, (2014) 14 SCC 295 (paras-13, 14, 15, 16, 16.1 to 16.5),** Hon'ble Supreme Court summarised legal propositions with

regard to grant of sanction for prosecution, as under:

*"13. **The prosecution has to satisfy the court** that at the time of sending the matter for grant of sanction by the competent authority, adequate material for such grant was made available to the said authority. This may also be evident from the sanction order, in case it is extremely comprehensive, as all the facts and circumstances of the case may be spelt out in the sanction order. However, **in every individual case, the court has to find out whether there has been an application of mind on the part of the sanctioning authority concerned on the material placed before it.** It is so necessary for the reason that there is an obligation on the sanctioning authority to discharge its duty to give or withhold sanction only after having full knowledge of the material facts of the case. Grant of sanction is not a mere formality. Therefore, the provisions in regard to the sanction must be observed with complete strictness keeping in mind the public interest and the protection available to the accused against whom the sanction is sought.*

*14. It is to be kept in mind that **sanction lifts the bar for prosecution**. Therefore, it is not an acrimonious exercise but a solemn and sacrosanct act which affords protection to the government servant against frivolous prosecution. Further, it is a weapon to discourage vexatious prosecution and is a safeguard for the innocent, though not a shield for the guilty.*

*15. Consideration of the material implies application of mind. Therefore, the order of sanction must ex facie disclose that the sanctioning authority had considered the evidence and other material placed before it. **In every individual case, the prosecution has to establish and satisfy the court by leading evidence that those facts were placed before the sanctioning authority and the authority had applied its mind on the same.** If the sanction order on its face indicates that all relevant material i.e. FIR, disclosure statements, recovery memos, draft charge sheet and other materials on record were placed before the sanctioning authority and if it is further discernible from the recital of the sanction order that the sanctioning authority perused all the material, an inference may be drawn that the sanction had been granted in accordance with law. This becomes necessary in case the court is to examine the validity of the order of sanction inter-alia on the ground that the order suffers from the vice of total non-application of mind. [Vide: Gokulchand Dwarkadas Morarka v. R., AlR 1948 PC 82; Jaswant Singh v. State of Punjab, AIR 1958 SC 124; Mohd. Iqbal Ahmed v. State of A.P., (1979) 4 SCC 172; State v. Krishanchand Khushalchand Jagtiani, (1996) 4 SCC 472; State of Punjab v. Mohd. Iqbal Bhatti, (2009) 17 SCC 92; Satyavir Singh Rathi, ACP v. State, (2011) 6 SCC 1; and State of Maharashtra v. Mahesh G. Jain, (2013) 8 SCC 119].*

***16.** In view of the above, the legal propositions can be summarised as under:*

***16.1**. The prosecution must send the entire relevant record to the sanctioning authority including the FIR, disclosure statements, statements of witnesses, recovery memos, draft charge sheet and all other relevant material. The record so sent should also contain the material/document, if any, which may tilt the balance in favour of the accused and on the basis of which, the competent authority may refuse sanction.*

***16.2**. The authority itself has to do complete and conscious scrutiny of the*

whole record so produced by the prosecution independently applying its mind and taking into consideration all the relevant facts before grant of sanction while discharging its duty to give or withhold the sanction.

***16.3**. The power to grant sanction is to be exercised strictly keeping in mind the public interest and the protection available to the accused against whom the sanction is sought.*

***16.4.** The order of sanction should make it evident that the authority had been aware of all relevant facts/materials and had applied its mind to all the relevant material.*

16.5**. **In every individual case, the prosecution has to establish and satisfy the court by leading evidence** that the entire relevant facts had been placed before the sanctioning authority **and the authority had applied its mind on the same and that the sanction had been granted in accordance with law."

(Emphasis supplied by us)

24. In the case of **State of Maharastra through CBI vs. Mahesh G Jain, (2013) 8 SCC 119**, Hon'ble Supreme Court has summarised the principle with regard to order for sanction of prosecution and its nature and held as under:

*"**14.** From the aforesaid authorities the following principles can be culled out: -*

***14.1.** It is **incumbent on the prosecution to prove that the valid sanction has been granted by the sanctioning authority** after being satisfied that a case for sanction has been made out.*

***14.2.** The sanction order may expressly show that the sanctioning authority has perused the material placed before him and, after consideration of the circumstances, has granted sanction for prosecution.*

14.3. The prosecution may prove by adducing the evidence that the material was placed before the sanctioning authority and his satisfaction was arrived at upon perusal of the material placed before it.

14.4**. Grant of sanction is only an administrative function and **the sanctioning authority is required to prima facie reach the satisfaction that relevant facts would constitute the offence.

14.5. The adequacy of material placed before the sanctioning authority cannot be gone into by the court as it does not sit in appeal over the sanction order.

14.6. If the sanctioning authority has perused all the materials placed before it and some of them have not been proved that would not vitiate the order of sanction.

14.7. The order of sanction is a pre-requisite as it is intended to provide a safeguard to a public servant against frivolous and vexatious litigants, but simultaneously an order of sanction should not be construed in a pedantic manner and there should not be a hyper-technical approach to test its validity."

(Emphasis supplied by us)

25. Sanction lifts the bar for prosecution. In every individual case, the prosecution has to satisfy the court by leading evidence that at the time of sending the matter for grant of sanction by the competent authority, adequate material for such grant was made available to the said authority. The court has to find out whether there has been an application of mind on the part of the sanctioning authority concerned on the material placed before it. The adequacy of material placed before the sanctioning authority cannot be gone into

by the court as it does not sit in appeal over the sanction order. If the sanctioning authority has perused all the materials placed before it and some of them have not been proved that would not vitiate the order granting sanction which is an administrative function based on satisfaction of the sanctioning authority that relevant facts would constitute the offence. **The legality and validity of the order granting sanction would be subject to review by the criminal courts** whereas an order refusing to grant sanction may attract judicial review by the superior courts. The court as referred in the Section 19, P.C. Act, is the court of Special Judge appointed under Section 3 to try cases under Section 4, as per procedure provided under Sections 5 and 6 of the P.C. Act. Ordinarily, question of sanction would be dealt with by the court at the stage of taking cognizance but if the cognizance is taken erroneously and the same comes to the notice of the court at a later stage, finding to that effect is permissible and such a plea can be raised at the time of framing of charges and it can be decided prima facie on the basis of accusation. Objection can be raised even before the appellate court. Thus, a writ petition under Article 226 of the Constitution of India to challenge the order granting sanction for prosecution, is ordinarily not maintainable inasmuch as the accused public servant has an opportunity before the court, i.e. Special Judge appointed under Section 3 of the P.C. Act to raise objection as aforesaid which has to be decided by the court in the light of the law laid down by Hon'ble Supreme Court in the case of **Devinder Singh (supra), Prakash Singh Badal (supra), Asian Resurfacing of Road Agency Pvt. Ltd. (supra) and Mahesh G. Jain (supra)**. Therefore, without expressing any opinion on merits of the case of the petitioner, the present writ petition is held to be not maintainable.

Protection of Section 197, Cr.P.C.:-

26. In the case of **Romesh Lal Jain vs. Naginder Singh Rana and others (2006) 1 SCC 294 (paras-11 and 13**), Hon'ble Supreme Court has settled the law that sanction required under Section 197, Cr.P.C. and sanction required under the P.C. Act, 1988 stands on different footings. Whereas sanction under the I.P.C. in terms of the Cr.P.C. is required to be granted by the State, the sanction under the P.C. Act, 1988 can also be granted by the authority specified in Section 19 thereof. In paragraphs 11 and 13 in the case of **Romesh Lal Jain (supra),** Hon'ble Supreme Court held as under:

"11.Sanction required under Section 197 Cr. P.C. and sanction required under the 1988 Act stand on different footings. Whereas sanction under the Indian Penal Code in terms of the Code of Criminal Procedure is required to be granted by the State; under the 1988 Act it can be granted also by the authorities specified in Section 19 thereof.

13.The High Court in its impugned order, however, does not appear to have taken that aspect of the matter into consideration. It failed to make a distinction between an order of sanction required for prosecuting a person for commission of an offence under the Penal Code and an order of sanction required for commission of an offence under the 1988 Act."

27. In the case of **Station House Officer, CBI/ ACB/ Bengalore vs. B.A. Srinivasan and another, (2020) 2 SCC 153**, Hon'ble Supreme Court reiterated that

protection under Section 19 of the P.C. Act is available to a public servant only till he is in employment and no sanction is required after public servant has demitted his office or retired from service. In Paras-14, 15 and 18, the Apex Court held as under:

*"**14.** Again, it has consistently been laid down that the protection under Section 197 of the Code is available to the public servants when an offence is said to have been committed "while acting or purporting to act in discharge of their official duty', but where the acts are performed using the office as a mere cloak for unlawful gains, such acts are not protected. The statements of law in some of the earlier decisions were culled out by this Court in Inspector of Police and another vs. Battenapatla Venkata Ratnam, (1991) 3 SCC 655 as under: (SCC pp.89-90, paras 7-9)*

"7. No doubt, while the respondents indulged in the alleged criminal conduct, they had been working as public servants. The question is not whether they were in service or on duty or not but whether the alleged offences have been committed by them "while acting or purporting to act in discharge of their official duty". That question is no more res integra. In Shambhoo Nath Misra v. State of U.P. (1997) 5 SCC 326, para 5, this Court held that: (SCC p. 328)

"5. The question is when the public servant is alleged to have committed the offence of fabrication of record or misappropriation of public fund, etc. can he be said to have acted in discharge of his official duties. It is not the official duty of the public servant to fabricate the false records and misappropriate the public funds, etc. in furtherance of or in the discharge of his official duties. The official capacity only enables him to fabricate the record or misappropriate the public fund, etc. It does not mean that it is integrally connected or inseparably interlinked with the crime committed in the course of the same transaction, as was believed by the learned Judge. Under these circumstances, we are of the opinion that the view expressed by the High Court as well as by the trial court on the question of sanction is clearly illegal and cannot be sustained.'

8. In Parkash Singh Badal v. State of Punjab, (2007) 1 SCC 1, at para 20 this Court held that: (SCC pp. 22-23)

"20. The principle of immunity protects all acts which the public servant has to perform in the exercise of the functions of the Government. The purpose for which they are performed protects these acts from criminal prosecution. However, there is an exception. Where a criminal act is performed under the colour of authority but which in reality is for the public servant's own pleasure or benefit then such acts shall not be protected under the doctrine of State immunity."

and thereafter, at para 38, it was further held that: (Parkash Singh Badal case (supra), SCC p. 32)

"38. The question relating to the need of sanction under Section 197 of the Code is not necessarily to be considered as soon as the complaint is lodged and on the allegations contained therein. This question may arise at any stage of the proceeding. The question whether sanction is necessary or not may have to be determined from stage to stage.'

9. In a recent decision in Rajib Ranjan v. R. Vijaykumar, (2015) 1 SCC 513, at para 18, this Court has taken the view that: (SCC p. 521)

"18. ... even while discharging his official duties, if a public servant enters

into a criminal conspiracy or indulges in criminal misconduct, such misdemeanour on his part is not to be treated as an act in discharge of his official duties and, therefore, provisions of Section 197 of the Code will not be attracted." (emphasis in original)

15. *It has also been observed by this Court that, at times, the issue whether the alleged act is intricately connected with the discharge of official functions and whether the matter would come within the expression "while acting or purporting to act in discharge of their official duty', would get crystalized only after evidence is led and the issue of sanction can be agitated at a later stage as well. In P.K. Pradhan vs. State of Sikkim, (2001) 6 SCC 704, this Court stated: (SCC pp.712-13, para 15)*

"15. Thus, from a conspectus of the aforesaid decisions, it will be clear that ***for claiming protection under Section 197 of the Code, it has to be shown by the accused that there is reasonable connection between the act complained of and the discharge of official duty.*** *An official act can be performed in the discharge of official duty as well as in dereliction of it.* ***For invoking protection under Section 197 of the Code, the acts of the accused complained of must be such that the same cannot be separated from the discharge of official duty, but if there was no reasonable connection between them and the performance of those duties, the official status furnishes only the occasion or opportunity for the acts, then no sanction would be required****. If the case as put forward by the prosecution fails or the defence establishes that the act purported to be done is in discharge of duty, the proceedings will have to be dropped.* ***It is well settled that question of sanction under Section 197 of the Code can be raised any time after the cognizance; maybe immediately after cognizance or framing of charge or even at the time of conclusion of trial and after conviction as well.*** *But there may be certain cases where it may not be possible to decide the question effectively without giving opportunity to the defence to establish that what he did was in discharge of official duty.* ***In order to come to the conclusion whether claim of the accused that the act that he did was in course of the performance of his duty was a reasonable one and neither pretended nor fanciful, can be examined during the course of trial by giving opportunity to the defence to establish it. In such an eventuality, the question of sanction should be left open to be decided in the main judgment which may be delivered upon conclusion of the trial."*** *(emphasis supplied)*

18. *Having considered the matter in entirety, in our view, the High Court clearly erred in allowing Criminal Revision Petition and accepting the challenge raised by the Respondent No.1 on the issue of sanction. We, thus, allow this Appeal, set aside the view taken by the High Court, restore the order passed by the Trial Court and dismiss the application seeking discharge preferred by the Respondent No.1." (Emphasis supplied by us)*

28. In the light of the law laid down by the Supreme Court in the case of **Romesh Lal Jain (supra) and B.A. Srinivasan and another (supra)**, it can be safely concluded that a sanction required under Section 197, Cr.P.C. and the sanction required under the P.C. Act, 1988, stands on different footings. Whereas sanction under the I.P.C. in terms of Cr.P.C. is required to be granted by the State; the sanction under the P.C. Act can be granted also by the authorities specified in Section 19 thereof. An

accused public servant who claims protection under Section 197 of the Cr.P.C., has to show that there is reasonable connection between the act complained of and the discharge of official duty. An official act can be performed in discharge of official duty as well as in dereliction of it. The act of the accused complained of must be such that the same cannot be separated from the discharge of official duty. But where there is no reasonable connection between the act complained of and the performance of official duties, no sanction under Section 197, Cr.P.C. would be required. In order to come to the conclusion whether claim of the accused that the act which he did was in the course of performance of his duty was a reasonable one and neither pretended nor fanciful, can be examined during the course of trial by giving opportunity to the defence to establish it. Thus, where the acts are performed by an accused public servant using the office as a mere cloak for unlawful gains, such acts are not protected. Where a criminal act is performed under the colour of authority but which in reality the act is for the public servant's own pleasure or benefit, then such acts are not protected under the doctrine of State immunity. If a public servant enters into a criminal conspiracy or indulges in criminal misconduct, such misdemeanour on his part is not to be treated as an act in discharge of his official duties and, therefore, provisions of Section 197 of the Code will not be attracted. Whether the alleged act is intricately connected with the discharge of official functions and whether the matter would come within the expression "while acting or performing in discharge of their official duties", would get crystallised only after evidence is led and the issue of sanction can be agitated at a later stage as well.

29. In the present set of facts, we find that the first order dated 25.04.2018 was passed by the State Government for further investigation by another Agency, i.e. CBCID which has attained finality after dismissal of Criminal Misc. Writ Petition No.12373 of 2018 (Dinesh Singh Chahar vs. State of U.P. and others). After the CBCID completed the investigation and submitted a report requesting for grant of sanction for prosecution against the petitioner, prima facie the State Government applied its mind and made certain queries and also called for detailed investigation report vide letters dated 14.01.2020 and 23.01.2020. Thereafter, the State Government passed the impugned order dated 27.01.2020 granting sanction for prosecution. The impugned order is an administrative order, which prima facie has been passed by the State government after due application of mind. The chargesheet dated 03.03.2020 has already been submitted by the prosecution before the competent court on 29.07.2020 and the court has taken cognizance. Under the circumstances and also in view of the provisions of Section 19 of the P.C. Act and the law settled by Hon'ble Supreme Court in **Mohd. Iqbal Bhatti (supra), Prakash Singh Badal (supra), Mahesh G. Jain (supra), Vinod Kumar Garg (supra) and Ashok Kumar Aggarwal (supra),** remedy is available to the petitioner to raise objection against the grant of sanction before the trial court.

30. The judgments relied by the learned counsel for the petitioner, are of no help to the petitioner on the facts of his case. In the case of **State of Punjab and another vs. Mohd. Iqbal Bhatti (supra)**, Hon'ble Supreme Court held that in the matter of grant on refusal to grant sanction, the State exercises statutory jurisdiction, however, the same would not mean that power once exercised cannot be exercised once again. For exercising its jurisdiction at a subsequent stage, express power of

review in the State may not be necessary as even such a power is administrative in character. It is however beyond any cavil that while passing an order for grant of sanction, serious application of mind on the part of the concerned authority is imperative. **The legality and/ or validity of the order granting sanction would be subject to review by criminal courts**. In the present set of facts, further investigation was directed by the State Government and pursuant thereto, the matter was investigated by the CBCID. The Agency submitted the report before the State Government who made certain queries and called for detailed investigation report and thereafter passed the impugned order. The judgment in the case of **Himanchal Pradesh vs. Nishat Sareen (supra) and Govind Kant Choudhary (supra)** relied by learned counsel for the petitioner is also distinguishable on the facts of the present case.

Conclusions:-

31. Discussion made and conclusions reached above by us are briefly summarised as under:-

(i) Sanction for prosecution under Section 19 of the P.C. Act has been provided by law as a safeguard to public servants to save them from vexatious and frivolous prosecution so as to give them freedom and liberty to perform their duty without fear or favour and not succumbed to the pressure of unscrupulous elements. Thus, Section 19 of the P.C. Act empowers the sanctioning authority to protect the innocent public servants from uncalled for prosecution but it is not intended to shield the guilty.

(ii) Sanction lifts the bar for prosecution. In every individual case, the prosecution has to satisfy the court by leading evidence that at the time of sending the matter for grant of sanction by the competent authority, adequate material for such grant was made available to the said authority. The court has to find out whether there has been an application of mind on the part of the sanctioning authority concerned on the material placed before it. The adequacy of material placed before the sanctioning authority cannot be gone into by the court as it does not sit in appeal over the sanction order. If the sanctioning authority has perused all the materials placed before it and some of them have not been proved that would not vitiate the order of sanction which is an administrative function based on satisfaction of the sanctioning authority that relevant facts would constitute offence.

(iii) **The legality and/ order validity of the order granting sanction would be subject to review by the criminal courts** whereas an order refusing to grant sanction may attract judicial review by the superior courts.

(iv) The court as referred in the Section 19, P.C. Act, is the court of Special Judge appointed under Section 3 to try cases under Section 4, as per procedure provided under Sections 5 and 6 of the P.C. Act.

(v) Ordinarily, question of sanction would be dealt with by the court at the stage of taking cognizance but if the cognizance is taken erroneously and the same comes to the notice of the court at a later stage, finding to that effect is permissible and such a plea can be raised at the time of framing of charges and it can be decided prima facie on the basis of accusation. Objection can be raised even before the appellate court.

(vi) Writ petition under Article 226 of the Constitution of India to challenge the order granting sanction for prosecution, is ordinarily not maintainable inasmuch as the accused public servant has an opportunity before the court, i.e. Special Judge appointed under Section 3 of the P.C. Act to raise objection to the grant of sanction for prosecution. Therefore, without expressing any opinion on merits of the case of the petitioner, the present writ petition is held to be not maintainable.

(vii) Earlier a Criminal Misc. Writ Petition No.12373 of 2018 was filed by the complainant Sri Dinesh Singh Chahar in which the petitioner herein was the respondent No.7. In that writ petition, the order dated 25.04.2018 directing further investigation by CBCID was challenged and the writ petition was disposed of by order dated 11.10.2018 upholding the order dated 25.04.2018 and directing the Investigating Agency to conclude the further investigation within a period of two months, positively and submit the police report before the competent court. The order dated 11.10.2018 has attained finality. That apart, the petitioner has not impleaded the complainant in the present writ petition who is the necessary party. The writ petition suffers from defect of non-joinder of necessary party.

(viii) An accused public servant who claims protection under Section 197 of the Cr.P.C., has to show that there is reasonable connection between the act complained of and the discharge of official duty. An official act can be performed in discharge of official duty as well as in dereliction of it. The act of the accused complained of must be such that the same cannot be separated from the discharge of official duty. But where there is no reasonable connection between the act complained of and the performance of official duties, no sanction under Section 197, Cr.P.C. would be required.

(ix) In order to come to the conclusion whether claim of the accused that the act which he did was in the course of performance of his duty was a reasonable one and neither pretended nor fanciful, can be examined during the course of trial by giving opportunity to the defence to establish it.

(x) Where the acts are performed by an accused public servant using the office as a mere cloak for unlawful gains, such acts are not protected. Where a criminal act is performed under the colour of authority but which in reality the act is for the public servant's own pleasure or benefit, then such acts are not protected under the doctrine of State immunity.

(xi) If a public servant enters into a criminal conspiracy or indulges in criminal misconduct, such misdemeanour on his part is not to be treated as an act in discharge of his official duties and, therefore, provisions of Section 197 of the Code will not be attracted. Whether the alleged act is intricately connected with the discharge of official functions and whether the matter would come within the expression "while acting or performing in discharge of their official duties", would get crystallised only after evidence is led and the issue of sanction can be agitated at a later stage as well.

32. For all the reasons afore-stated, **the writ petition is dismissed**, leaving it open for the petitioner to raise objection in State Trial No.432 of 2020 against the order granting sanction for prosecution, before the court of Additional District and Sessions Judge/ Special Judge, P.C. Act, Meerut.

(2021)06ILR A367
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.01.2021

BEFORE

THE HON'BLE MAHESH CHANDRA TRIPATHI, J.
THE HON'BLE SANJAY KUMAR PACHORI, J.

Writ-C No. 27636 of 2020

Kumar Sambhav Pal ...Petitioner
Versus
Union of India & Anr. ...Respondents

Counsel for the Petitioner:
Sri Anand Kapoor Pandey

Counsel for the Respondents:
A.S.G.I., Sri Dhananjay Awasthi, Sri Hridai Narain Pandey, Sri Purnendu Kumar Singh

Constitution of India- Article 226 - Scrutiny / Re- evaluation of answer sheet - power under Article 226 may only be invoked in rare & exceptional cases where the error or illegality is patent & manifest i.e. where material error has been committed - Onus and burden lies solely on the petitioner to prima facie establish that there has been an apparent and evident mistake in the process of evaluation - evaluation undertaken by the examining bodies should not be viewed with suspicion unless it is prima facie established that it was not fair or transparent - Such challenge may only be accepted when it is well substantiated & rest on a strong pedestal which is likely to succeed (Para 8, 11)

Petitioner appeared in NEET (UG) 2020 - after examination, answer key uploaded on the official website - petitioner did not challenge the same- Testing agency uploaded scanned image of OMR sheets of all the candidates – petitioner expected to score more than 600 marks - but petitioner secured just 146 out of 720 marks - petition filed for direction to the respondents to produce his OMR sheet - *Held* - petitioner neither denied his signatures nor his roll number in his handwriting on the OMR uploaded on the official website - entire claim set up on false ground (Para 8, 11)

Dismissed. (E-4)

List of Cases cited:

1. Manoj Kumar Tiwari Vs U.O.I. & ors. Writ C No.19615 of 2020 dt 8.12.2020

2. Abdul Azeez Vs U.O.I. Writ Petition (C) No.11495 of 2020 (S) dt 30.6.2020

(Delivered by Hon'ble Mahesh Chandra Tripathi, J. & Hon'ble Sanjay Kumar Pachori, J.)

1. Heard Shri A.K. Pandey, learned counsel for the petitioner; Shri Purnendra Kumar Singh, learned counsel for the Union of India and Shri Dhananjay Awasthi, learned counsel for the respondent no.2/Senior Director, National Testing Agency, Ministry of Education, Government of India, New Delhi.

2. The present writ petition is preferred seeking following reliefs:-

"i. To issue a writ, order or direction in the nature of mandamus directing the respondent No.2 to reserve a seat for the petitioner having Roll No.4402006652 (OBC-(NCL) Category Candidate) in on-going conselling of National Eligibility-cum-Entrance Test (Under Graduate)-2020 (in short "NEET (UG)-2020" conducted by the respondents;

ii. To issue a writ, order or direction in the nature of mandamus directing the respondents to consider the candidature of the petitioner having Roll No.4402006652 (OBC-(NCL) Category Candidate) in on-going counseling of National Eligibility-cum-Entrance Test (Under Graduate)-2020

(in short NEET (UG)-2020" conducted by the respondents.

iii. To issue a writ, order or direction in the nature of mandamus directing the respondents to produce the OMR Sheet pertaining to the petitioner before this Hon'ble Court."

3. Learned counsel for the petitioner submits that the petitioner belongs to Other Backward Class Category. He appeared in National Eligibility-cum-Entrance Test (Under Graduate)-20201 on 13.9.2020. After conducting the aforesaid examination, the National Testing Agency (NTA) uploaded the answer key for different series of booklets on 26.09.2020. The petitioner did not challenge his answer key uploaded by the NTA. Thereafter, the NTA released the OMR sheets of NEET (UG)-2020 on 05.10.2020 and also uploaded the scanned image of OMR sheets of all the candidates. Finally, the NTA declared the result on 16.10.2020 and on the same day, the score cards of all candidates were also uploaded. After declaration of the final result, the petitioner came to know that there is a huge difference between the marks as obtained by him and the marks, which were expected to be secured by the petitioner. As per his own calculation based on the answer keys, the petitioner expected to score more than 600 marks out of 720. It is claimed that due to non-downloading the scanned image of the OMR sheet uploaded on the official website of NTA, the petitioner could not participate in the counselling and he was surprised to know that he had secured 146 marks out of 720. This situation has impelled the petitioner to approach before this Court under Article 226 of Constitution of India.

4. On the other hand, Shri Dhananjay Awasthi, learned counsel for the respondent no.2 has placed the categorical instruction and the same is taken on record. In the instructions in question, it has been stated that the Ministry of Human Resource Development (MHRD), now renamed as Ministry of Education, Government of India (GOI), has established National Testing Agency (NTA) as an independent, autonomous and self-sustained premier testing organisation registered under the Societies Registration Act, 1860 to conduct efficient, transparent and international standard test in order to access the competency of candidates for admission to premier higher education institutions; to undertake research on educational, professional and testing systems to identify gaps in the knowledge systems and taking steps for bridging them; to identify experts and institutions in setting examination questions and to produce and disseminate information and research on education and professional development standards.

5. Section 14 of the National Medical Commission Act, 2019 provides for holding of a common and uniform National Eligibility-cum-Entrance Test for admission to the undergraduate medical courses in all medical institutions including those governed under any other law. Thus, the admission to MBBS course in AIIMS, New Delhi, JIPMER and all AIIMS like Institutions is also being made through NEET. The eligibility criteria applicable to appear in NEET (UG) shall also be applicable to the candidates desirous to take admission to INIs like AIIMS. The NTA has been mandated by the Ministry of Health and Family Welfare to conduct the National Eligibility Cum Entrance Test (UG) throughout the country since the year 2019. The NEET (UG) - 2020) has been conducted on 13.9.2020 in Pen and Paper mode as an uniform entrance examination for admission to MBBS/BDS Courses and

other undergraduate medical courses in approved/recognized Medical/Dental & other Colleges/ Institutes in India. The norms/procedure/timeliness followed in the conduct of this examination are as per Section 10-D of the Indian Medical Council Act, 1956 and relevant Regulations notified thereunder by Medical Council of India (MCI) from time to time for regulating graduate medical education.

6. The NEET (UG) 2020 has been conducted by NTA on 13.09.2020 and 14.10.2020 (only for COVID-19 affected candidates). The combined results of the examinations was declared on 16.10.2020 on the official website of NTA through public notice dated 17.10.2020. The result of all the candidates alongwith their All India Rank (AIR) has been handed over to the office of Director General of Health Services (DGHS), Ministry of Health & Family Welfare on 26.10.2020 for counselling/admission. The pattern of the examination has also been provided under Clause 3.2 and 3.3 at page 13 of the Information Bulletin of NEET (UG) 2020, wherein total 180 number of multiple choice questions with four options and single correct answer, were given and the aggregate marks were 720. Each question carries four marks and for each correct answer/best option, the candidate will get four marks. For each incorrect answer, one mark will be deducted from the total score. To answer a question, the candidate has to find for each question the correct answer/best option. The NEET (UG) 2020 is a Pen & Paper based test to be answered on the specially designed machine gradable sheet using Ball Point Pen.

7. It is pertinent to note that the 'specially designed machine gradable sheet' is called 'Answer Sheet', which is popularly known as the Optical Mark Recognition (OMR) sheet. The candidate records his/her response in it by darkening only one circle for each question/entry. The NTA displayed the OMR sheets of all candidates including the petitioner with effect from 05.10.2020 onwards and no change/modification has been made thereafter. The results have been declared on the basis of the responses marked in the OMR/Answer Sheet, which was also provided to all the candidates including the petitioner. As per the calculation sheet of the candidate/petitioner, which has been generated from the system on the basis of the questions attempted by him on his actual OMR/Answer Sheet, the petitioner has attempted 154 questions. He has answered 60 questions correctly and 94 incorrectly. As per the marking scheme of the examination, 04 marks are awarded for each correct answer and 01 mark for each incorrect answer is deducted from the total score/marks. As such, the petitioner had secured 146 marks (60x4-94x1) out of the total marks of 720, as correctly provided in the score card.

8. In this backdrop, Shri Dhananjay Awasthi, learned counsel for the respondent no.2 has vehemently contended that in order to achieve optimum level of accuracy, a detailed procedure is followed in the finalization of result. He submits that there are many layers of checks to verify the identity of the OMR sheet, therefore, there is hardly any scope or likelihood of any discrepancy in the online evaluation system conducted by NTA as the petitioner's OMR sheet has been scanned and tallied properly. He further makes submission that at no point of time the petitioner has denied his signatures nor his roll number in his handwriting on the OMR uploaded on the official website of NTA.

Therefore, the OMR uploaded on the official website has been assessed for declaration of the result being the only OMR on record, which was submitted by the petitioner himself. He submits that the exhaustive procedure is provided and there is hardly any scope for human involvement and there is no discrepancy. The entire claim has been set up on false ground and the petitioner tried to take undue advantage over other candidates by claiming himself that he has secured more than 600 marks out of 720 but in fact, he has secured only 146 marks as shown in the score card, which has been uploaded on official website of the NTA. In support of his submission, he has also placed reliance on the judgment dated 8.12.2020 passed by learned Single Judge of this Court in Writ C No.19615 of 2020 (**Manoj Kumar Tiwari vs. Union of India and 3 others**)2. The relevant portion of the judgment is extracted herein under:-

"The petitioner seeks the issuance of a writ commanding the respondents to undertake a revaluation of his answer script submitted in respect of the subject- "Community and Elementary Education". The issue itself arises in the backdrop of the petitioner having participated in an entrance examination conducted by the second respondent for granting admission to its D.EL.E.D. course. Being unsuccessful in obtaining admission to that course, he has petitioned this Court for reevaluation of the answer script in question.

It becomes pertinent to note that prior to approaching this Court the petitioner has not obtained a copy of the answer script from the respondents, a procedure that could have been adopted and is permissible in law in light of the law as declared by the Supreme Court in ***Central Board of Secondary Education Vs. Aditya Bandhopadhya and others****3. The Court is thus left to consider the reliefs claimed in the petition solely on the basis of the following averments as made in paragraphs 9 to 12 of the writ petition which read thus:-*

"9. That the petitioner has solved the question paper to the best of his ability but when the statement of marks awarded to the petitioner in Sub Code No. 507 he was shocked.

10. The the petitioner apprehends that answer book of the subject Community and Elementary Education on (Subject Code No. 507) has not been properly checked/evaluated.

11. That possibility of errors in calculation of marks, cannot be ruled out, but unless any direction to ensure rechecking or scrutiny is issued the Institute may not take any step.

12. That the petitioner has good academic career, he awarded 199/500 in Purva Madhyama, 323/600 in Uttar Madhyama, 1199/2200 in Shashtri Pariksha and 590/900 in Acharya Pariksha and in result of D.EL.Ed. Course subject Nos. 501 to 514 except Code No. 507 he awarded good marks and he hopes that he will get more than 28 marks."

The practice of approaching this Court directly without obtaining copies of the answer scripts or seeking directions requiring examining bodies to produce answer books cannot but be deprecated in the strongest terms, discouraged and curbed. The conduct of examinations by educational authorities cannot be lightly interfered with unless the petition rests on a strong foundation and it is at least prima facie established that there has been an apparent and evident mistake in the process of evaluation. The onus and burden on this aspect lies solely on the petitioner and is one which must be discharged at the

threshold. In order to establish a stark or glaring mistake in the process of evaluation it is imperative for the petitioner to establish from the record that an apparent illegality has been committed by the examiner. That cannot possibly be done unless a copy of the answer script has been obtained and the petitioner upon a perusal thereof finds a manifest error or illegality in the evaluation undertaken. The burden to prove that a fair evaluation was in fact undertaken cannot stand shifted or placed upon the examining body unless this primary fact is established by the petitioner. This essentially since the examining body cannot be commanded to prove a fact in the negative.

An evaluation undertaken by examining bodies should not be viewed with suspicion unless it is prima facie established that it was not fair or transparent. Courts must necessarily be wary of entertaining such challenges unless it be well substantiated and found to rest on a strong pedestal which is likely to succeed. In any case a foray like the present cannot be entertained simply on the basis of a stated apprehension or the candidate's own assessment of performance in the examination. A challenge to an evaluation undertaken by examining bodies, in any case, on a mere allegation that "possibility of errors in calculation of marks cannot be ruled out..." cannot be countenanced. It must necessarily, for reasons aforenoted, stand on sounder footing.

More fundamentally the Court takes notes of the submission of Sri Awasthi who submits that no provision for reevaluation exists in terms of which a direction as claimed by the petitioner may be issued. While the absence of a provision for reevaluation may not completely denude the Court from examining a challenge to an evaluation process under Article 226 of the Constitution, its powers may be invoked in rare and exceptional cases and where the error or illegality is patent and manifest. The Court deems it apposite to notice the following conclusion as ultimately pronounced in ***Ran Vijay Singh Vs. State of U.P****.4*

30.2. If a statute, Rule or Regulation governing an examination does not permit re-evaluation or scrutiny of an answer sheet (as distinct from prohibiting it) then the court may permit re-evaluation or scrutiny only if it is demonstrated very clearly, without any "inferential process of reasoning or by a process of rationalisation" and only in rare or exceptional cases that a material error has been committed;

The above position was again explained in ***High Court of Tripura v. Tirtha Sarathi Mukherjee****5 with the Supreme Court observing: -*

20. The question however arises whether even if there is no legal right to demand re-valuation as of right could there arise circumstances which leave the Court in any doubt at all. A grave injustice may be occasioned to a writ applicant in certain circumstances. The case may arise where even though there is no provision for re-valuation it turns out that despite giving the correct answer no marks are awarded. No doubt this must be confined to a case where there is no dispute about the correctness of the answer. Further, if there is any doubt, the doubt should be resolved in favour of the examining body rather than in favour of the candidate. The wide power under Article 226 may continue to be available even though there is no provision for re-valuation in a situation where a candidate despite having giving correct answer and about which there cannot be even the slightest manner of doubt, he is treated as having given the wrong answer and

consequently the candidate is found disentitled to any marks.

21. Should the second circumstance be demonstrated to be present before the writ court, can the writ court become helpless despite the vast reservoir of power which it possesses? It is one thing to say that the absence of provision for re-valuation will not enable the candidate to claim the right of evaluation as a matter of right and another to say that in no circumstances whatsoever where there is no provision for re-valuation will the writ court exercise its undoubted constitutional powers? We reiterate that the situation can only be rare and exceptional."

As is evident from the above exposition of the law on the subject, there must be a demonstrable illegality in the evaluation undertaken and only in such rare and exceptional cases would the Court be legally justified in invoking its jurisdiction. The petitioner here has miserably failed to meet the tests as evolved and noticed above.

The writ petition consequently fails and is dismissed."

9. Hon'ble Supreme Court has also occasion to consider similar issue and dismissed the Writ Petition (C) No.11495 of 2020 (S) (**Abdul Azeez vs. Union of India represented by its Secretary, Ministry of Human Resource Development, New Delhi and another**)6 on 30.6.2020 with following observations:-

"32. Though, the petitioner has filed an application, not numbered, seeking for a direction to respondents 5, 6 and 7 - Ministry of Home Affairs represented by its Secretary, Ministry of External Affairs represented by its Secretary, and Ministry of Civil Aviation represented by its Secretary, to operate Special Chartered flights for the students from Qatar and other Gulf Co-operation countries, exclusively for the NEET (UG)-2020 aspirants, for attending NEET examinations scheduled in various cities in India, it is for the students, who have registered their names for NEET examination, to make necessary arrangements with the operators. We cannot issue any directions to the Government or the MCI, as the case may be. The guidelines issued by the Ministry of Home Affairs, Government of India, New Delhi enabling the students to travel are in vogue from 5.5.2020 onwards. NTA has fixed the date of NEET (UG-2020) examination on 26.07.2020. There are no materials, as to when the students, intending to take part in NEET(UG) - 2020 examination, have reported the authorities to permit them to travel to India, to take up NEET examination. Ministry of External Affairs, New Delhi has replied thus:

"VBM flights include students and other compelling cases. Our Missions would try their best to accommodate Indian students and OCI students (if they fall within the MHA SOP guidelines) appearing in NEET exam."

In the light of the above discussion, we are of the view that the prayers sought for by the petitioner in this public interest writ petition cannot be granted. Writ petition fails and accordingly, dismissed."

10. The NEET is one of the highest competitive examination, opening opportunities for students to get into the most prestigious medical colleges. The NEET (UG)-2020 examination was smoothly held amid strict precautions in view of the COVID-19 pandemic on 13.9.2020 on the given schedule in a secure and healthy atmosphere by following all the directions and advisories sincerely. Due to the COVID-

19 pandemic, 85-90 percent of 15.97 lakh candidates appeared for NEET (UG)-2020 examination. The NTA released the answer keys of the NEET (UG)-2020 on 26.9.2020 and the aspirants were able to download the code-wise official NEET (UG)-2020 question paper with solutions from the NTA official website and challenge it as well. Admittedly, the petitioner did not challenge his answer key uploaded by the NTA on the official website. Thereafter, the NTA declared the final result on 16.10.2020 wherein, he had secured only 146 marks out of 720.

11. In the aforesaid facts and circumstances, we are of the opinion that the evaluation undertaken by the examining bodies should not be viewed with suspicion unless it is prima facie established that it was not fair or transparent. Such challenge may only be accepted unless it be well substantiated and found to rest on a strong pedestal which is likely to succeed. In the present matter, the detailed instruction, as enumerated above, clearly transpires to the Court that the entire pleading has been set up on vague and evasive grounds.

12. We do not find any good ground to interfere in the present writ petition.

13. Consequently, the writ petition is **dismissed**.

(2021)06ILR A373
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 21.06.2021

BEFORE

THE HON'BLE VIKAS KUNVAR SRIVASTAV, J.

Crl. Misc. Bail Application No 452 of 2021

Shameem Ahmad ...Applicant
Versus
State of U.P. ...Opp. Party

Counsel for the Applicant:
Jitendra Singh

Counsel for the Opp. Party:
G.A.

A. Criminal Law - Code of Criminal Procedure, 1973 - Section 439 - Indian Penal Code, 1860-Sections 306, 511, 109, 506, 504-application-rejection The dispute of tenancy between the deceased and his building owner, co-accused was pending in the Civil Court, this fact is also known from the evidence collected by the prosecution-The fact mentioned in the F.I.R. that owner was insisting on paying the rent due or vacating the house and when the deceased refused to do so as usual citing his financially tight condition, angered owner, abused in anger and said that pay the rent otherwise leave the house or die by burning somewhere-Immediately after this incident, the deceased did not commit the incident of setting himself on fire, so that it can be called an abatement to suicide-The incident of self immolation occurred after five days-A journalist is not expected to dramatize a sensational and horrifying incident and make news by putting his actor in pitiable condition in danger- In this case, from the statement of the F.I.R. and the statements of the oral witnesses which have been recorded during the investigation, prima facie it is established that the accused tempted the deceased that if he would try to commit suicide in front of the Legislative Assembly building, by making a video of him, he will telecast the same on television with matter of misbehaviour of owner with him-After this the owner will not be able to evict him out from the house-the investigator has seized the video camera and film from the accused, evidence of independent witness, an electronic engineer- a man identified as accused was seen recording the film of the deceased even prior to this incident of his self burning, Instead of saving the grievously burning deceased, the accused kept on filming it till he was badly scorched -The suicide was committed only after the plan suggested

by the present accused-applicant, Hence parity can not be claimed.(Para 1 to 30)

B. Factors laid down in various judgment of Hon'ble the Supreme Court for grant or refusal of bail are as follows:-

"(i) Whether there was a prima facie or reasonable ground to believe that the accused had committed the offence;
(ii) nature and gravity of accusations;
(iii) severity of the punishment in the event of a conviction;
(iv) danger of the accused absconding or fleeing, if granted bail;
(v) character, behavior, means, position and standing of the accused;
(vi) likelihood of repetition of the offence;
(vii) reasonable apprehension of the witnesses being influenced; and
(viii) danger of justice being thwarted by grant of bail." (Para 28)

The application is rejected. (E-5)

List of Cases cited:

Sudha Singh Vs St. of U.P. & anr. (2021) AIR SC 2149

(Delivered by Hon'ble Vikas Kunvar Srivastav, J.)

1. The case is called out through video conferencing.

2. Learned counsel for the bail-applicant Sri Jitendra Singh, Advocate and learned A.G.A. for the State Sri Prem Prakash, Advocate are connected through video conferencing in virtual hearing of the case.

3. The present bail-application is moved on behalf of accused-applicant- Shameem Ahmad, who is involved in Case Crime No.209 of 2020, under Sections 306/511/109/506/504 of I.P.C., registered at Police Station Hussainganj, District Lucknow.

4. Reading over the first information report lodged on 20.10.2020, learned counsel for the bail applicant submits the prosecution case, as emerging from the first information report and the statements of the witnesses that the informant-wife of the deceased, who belongs to Kolkata (West Bengal), resides from 10-12 years as a tenant in House No.155, Diamond Dairy, Udaiganj, District Lucknow which is owned by one Zaved Khan, the co-accused. The landlord Zaved Khan wanted them to vacate the house, therefore, her husband-the deceased (Surendra Chakraborty) filed a suit against him for harassing them. On 19.10.2020 in the afternoon, Zaved Khan came to the house, started abusing her husband in filthy language and asked him to vacate the house. When her husband told him his being in financial trouble and inability to vacate the house, the landlord Zaved Khan scoldingly asked him to set himself ablazed and die, if he is not able to vacate the accommodation. However, on prayer and request made by the complainant and other people, the landlord Zaved Khan went back. Afterwards, her husband under humiliation became depressed and so sad that started thinking about suicide.

5. It has been further alleged that journalists Shamim (the present accused-applicant) and Naushad Ahmad (the co-accused), contacted her husband (deceased) and induced him to set himself ablazed into fire just in front of "Vidhan Sabha Bhawan" so that they may filmed the incident by videography and telecast the same on television. If it happens, the matter, so as planned will get highlighted and no one will force him to evict him from his house. Under the aforesaid inducement, given by both the accused i.e. the accused-applicant-Shamim and co-accused, Naushad Ahmad brought her husband (the deceased) in front of "Vidhan Sabha Bhawan", where her husband, as induced and planned, poured oil on him and lit fire, the accused journalists were making video

of the incident. The policemen present there, ran to save her husband by covering him with a blanket and took him to a hospital where he subsequently died on 24.10.2020.

6. Learned counsel for the bail-applicant in the above context argued that after registering first information report, police started investigation and the statements of complainant and witnesses were recorded, wherein prosecution finds no support. Learned counsel further submitted that the applicant and the complainant do not know each other neither they have any relation nor he is any beneficiary, if the said house is vacated, the landlord Zaved Khan will only be benefited.

7. Learned counsel further submitted that the name of present accused-applicant has been arrayed in the column of accused only when he tried to help the deceased on the spot of incident with the help of police subsequently made a video for evidence as he is a journalist by profession and passing thereby at the time of incident. Learned counsel further submitted that it is a settled principle of law that a passing reference been made against any person would not be sufficient to invite the penalty under the provisions of Section 306 I.P.C.

8. Learned counsel further submitted that in order to constitute abatement for suicide, there must be course of conduct or any such actions of intentionally aiding or facilitating another person to end life but the perusal of the F.I.R. does not disclose any such evidence or allegation which could invite the penalty under Section 306 of the I.P.C.

9. Learned counsel further submitted that in order to constitute abatement, intentional involvement of a person to aid or instigate commission of suicide is imperative and any severance or absence of any of these constituent would mitigate against the said indictment.

10. Learned counsel further submitted that there is no evidence to the effect that the applicant had indulged in any such instigation or abatement which could invite the allegations leveled against the applicant for abating to commit suicide and as a matter of fact, no such statement of deceased has been recorded during his treatment in hospital nor in front of any magistrate.

11. Learned counsel further submitted that the applicant is co-editor of Daily Hindi Newspaper in Janma Prasaran Times and RTI Activist and due to this very reason so many officials were annoyed with him, therefore, he has falsely been implicated in the present case.

12. Learned counsel further submitted that no overt act of abating or any omission on part of the applicant has been leveled against the applicant, the applicant is not a previous convict by any court of law and for no fault of him, he is languishing in jail since 21.10.2020. However, learned counsel further submitted that the applicant is ready to furnish adequate and reliable sureties for his release and has a permanent residence, therefore, there is no possibility of his absconding.

13. It is also argued by learned counsel for the bail-applicant that the accused-applicant is entitled to be given parity as the co-accused, Zaved who was landlord, has already been granted bail by the Sessions Court vide order dated 31.10.2020.

14. Protesting the bail plea as argued by learned counsel for the bail-applicant, learned A.G.A. for the State submitted that accused-applicant was in regular touch with the deceased and he has enticed the deceased to commit suicide as it is revealed from the call records of the accused-applicant, moreover, three mobile phones are also recovered from him. Learned A.G.A. further submitted that the deceased was immediately carried to the Civil Hospital from where, he was referred to Sips Hospital but subsequently he died on 24.10.2020 during his treatment.

15. Learned A.G.A. for the State further submitted that the present accused-applicant is a person of mischievous character. On the basis of instructions received to him, he has submitted that it is sufficient to show the instinct of the accused that he will affect adversely the witnesses and the evidences against him, if released on bail. Learned A.G.A. further submitted that even after the lodging of first information report, nature and behavior of the accused-applicant are enough to dis-entitle him for grant of bail at this stage.

16. Learned A.G.A. further submitted that the learned trial court need be directed to proceed expeditiously so as the complainant's evidences alongwith other material witness of the fact are recorded so that the complainant may be saved from being affected adversely by reason of long drawn trial.

17. Having heard the arguments of learned counsel for the accused and learned A.G.A. for the State, perused the relevant documents available on record. The identity card of the accused has been presented on behalf of the accused. Thus, the fact alleged in the F.I.R. that he had contacted the deceased as a T.V. journalist is an accepted fact.

18. The dispute of tenancy between the deceased and his building owner, Zaved was pending in the Civil Court, this fact is also known from the evidence collected by the prosecution. The fact mentioned in the F.I.R. that Zaved was insisting on paying the rent due or vacating the house and when the deceased refused to do so as usual citing his financially tight condition, angered Zaved, abused in anger and said that pay the rent otherwise leave the house or die by burning somewhere. Immediately after this incident, the deceased did not commit the incident of setting himself on fire, so that it can be called an abatement to suicide. The incident of self immolation occurred after five days on 24.10.2020.

19. The journalist keeps an eye on the anticipated or sudden events happening in the society and brings them to the information of all the people through various news media without any tampering, this is his business.

20. A journalist is not expected to dramatize a sensational and horrifying incident and make news by putting his actor in pitiable condition in danger of death.

21. In this case, from the statement of the F.I.R. and the statements of the oral witnesses which have been recorded during the investigation, prima facie it is established that the accused tempted the deceased that if he would try to commit suicide in front of the Legislative Assembly building, by making a video of him, he will telecast the same on television with matter of misbehavior of Zaved with him. After

this Zaved will not be able to evict him out from the house.

22. During the investigation as electronic evidence, the investigator has seized the video camera and film from the accused, evidence of independent witness, an electronic engineer named Kuldeep Singh posted in control room of Secretariat stated on the basis of C.C.T.V. installed on the gate no.4, given statement which is annexure no.7 to the counter affidavit, which discloses, according to the plan, the deceased reached in front of the Legislative Assembly building in front of the gate no.3, stood at middle of the road, put oil on himself and set it on fire, meanwhile, a man identified as accused was seen recording the film of the deceased even prior to this incident of his self burning. Instead of saving the grievously burning deceased, the accused kept on filming it till he was badly scorched. Policemen were also seen trying to rescue the deceased from burning in the confiscated film.

23. In these evidences, the case of the prosecution against the accused is prima facie established that he told the deceased, living in mental and financial distress, to the temptation and plan to get rid of them. He was present with the deceased at the scene of the incident and filming it. Therefore, the claim of his innocence by the accused is prima facie not established.

24. So far as the grant of bail to the co-accused, Zaved is concerned, the benefit of parity could not be given in the case of present accused-applicant because in case of Zaved, only a passing remark to go and die by burning was made on 19.10.2020. The deceased has not committed suicide in pursuance of and under the effect of that remark. In case of Zaved, no overt act in furtherance of his inducement, is done to facilitate or to compel the deceased to commit suicide. The suicide was committed on 24.10.2020, only after the plan suggested by the present accused-applicant.

25. So far as the personal liberty of the accused and his right to be released on bail is concerned, it is not valid in violation or in breach of fundamental right of the other party. The complainant, who is already mentally distressed by her husband's financial condition, who further committed suicide under the influence of the accused, if the accused is made free, she would be in danger. She is the main witness in the case. For fair trial, the complainant would need a completely fear-free environment as a witness. She has the right to have a fair trial of the matter.

26. The criminal details of the accused are given in the counter affidavit, which is as follows:-

"1. Case Crime No.171/1999, under Sections 504, 506 and 427 of I.P.C. registered at Police Station Cantt., District Lucknow.

2. Case Crime No.478/1999, under Sections 3/25 of Arms Act, registered at Police Station Mahanagar, District Lucknow.

3. Case Crime No.21/2000, under Sections 160 of I.P.C., registered at Police Station Hussainganj, District Lucknow.

4. Case Crime No.22/2000, under Sections 4/25 of Arms Act, registered at Police Station Hussainganj, District Lucknow.

5. Case Crime No.27/2000, under GOONDAS Act, registered at Police Station Hussainganj, District Lucknow.

6. Case Crime No.494/2000, under Section 110 of G. Act, registered at Police Station Hussainganj, District Lucknow.

7. Case Crime No.86/2004, under Section 110 of G. Act, registered at Police Station Hussainganj, District Lucknow.

8. Case Crime No.117/2010, under Section 110 of G. Act, registered at Police Station Hussainganj, District Lucknow.

9. Case Crime No.275/2010, under Section 110 of G. Act, registered at Police Station Hussainganj, District Lucknow.

10. Case Crime No.330/2013, under Sections 323, 504, 427 of I.P.C., registered at Police Station Hazratganj, District Lucknow.

11. Case Crime No.228/2014, under Sections 386, 506 of I.P.C., registered at Police Station Wazirganj, District Lucknow."

27. These criminal details also cast doubt on him that he will take undue advantage of his immunity and his status on bail.

28. Factors laid down in various judgment of Hon'ble the Supreme Court for grant or refusal of bail are as follows:-

"(i) Whether there was a prima facie or reasonable ground to believe that the accused had committed the offence;

(ii) nature and gravity of accusations;

(iii) severity of the punishment in the event of a conviction;

(iv) danger of the accused absconding or fleeing, if granted bail;

(v) character, ***behavior, means, position and standing of the accused;***

(vi) ***likelihood of repetition of the offence;***

(vii) reasonable apprehension of the witnesses being influenced; and

(viii) danger of justice being thwarted by grant of bail."

29. Hon'ble the Supreme Court further in the case of ***Sudha Singh Vs. The State of Uttar Pradesh & Anr.*** reported in ***AIR 2021 SC 2149*** 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."

30. The application of the bail moved on behalf of accused-applicant on the basis of above discussions is ***rejected.***

31. The accused-applicant also has right of speedy trial. It is informed by learned A.G.A., charge sheet has already been submitted before the trial court. The officers entrusted with the prosecution i.e. Sri Manoj Tripathi, D.G.C. (Criminal), Lucknow and Sri Surya Bhan, Joint Director (Prosecution), Lucknow is directed to ensure the 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.

32. Learned trial court below is also directed to expeditiously proceed with the trial and conclude the same within a reasonable period of one year from the date, certified copy of the order is placed before it. In deciding the case on merit, the trial court need not to be swayed away with any observation made by this Court in the order.

33. Learned Senior Registrar is directed to communicate the order of the Court with regard to the expeditious disposal to both, the officers of the police department and the trial court also.

34. The present accused-applicant may have right to avail remedy of bail afresh after expiry of aforesaid period.

(2021)06ILR A379
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 15.06.2021

BEFORE

THE HON'BLE VIKAS KUNVAR SRIVASTAV, J.

Bail No. 1012 of 2021

Shabbir ...Applicant
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
Anil Kumar Srivastava, Ravindra Kumar Dwivedi

Counsel for the Opp. Party:
G.A.

(A) Criminal Law - Bail - Indian Penal Code, 1860 - Sections 363, 366, 376 & 506 , The Protection of Children From Sexual Offences Act, 2012 - Section 3/4, Section 29 - presumption as to certain offences, Section 30 - Presumption of culpable homicide , The Scheduled Castes /Scheduled Tribes (Prevention from Atrocities) Act, 1989 - Section 3(2)(5) , The Code of Criminal Procedure, 1973 - Sections 161 & 164 .

Penetrative offence under POCSO Act against accused-applicant - age of victim below 16 years - Statements of victim under Section 161 Cr.P.C. and 164 Cr.P.C. are intact ,believable and reliable - No explanation of the incident made in the affidavit in support of bail-application .

HELD:-Section 29 of the POCSO Act makes a presumption of the offence, since the allegations made by the victim girl remains unrebutted, therefore, prima facie the presumption of commission of offence by the present accused-applicant is constituted. Victim is a child and she might be exposed to the threat of life and living as well as undue pressure in the course of trial as the accused is also a native of the same locality. Accused-applicant is capable of tampering the evidences and affect the witness adversely. (Para - 15,16)

Bail application rejected. (E-6)

(Delivered by Hon'ble Vikas Kunvar Srivastav, J.)

1. The case is called out through video conferencing.

2. Learned counsel for the bail-applicant Sri Anil Kumar Srivastava, Advocate and learned A.G.A. for the State Sri Prem Prakash, Advocate are connected through video conferencing in virtual hearing of the case.

3. The present bail-application is moved on behalf of accused-applicant-Shabbir, who is involved in Case Crime No.209 of 2020, under Sections 363, 366, 376, 506 of I.P.C., Section 3/4 of POCSO Act and Section 3(2)(5) of SC/ST Act, registered at Police Station Motigarpur, District Sultanpur.

4. Reading over the first information report lodged on 13.07.2020, learned counsel for the bail applicant submits the prosecution case, as emerging from the first information report and the statements of the witnesses is that, according to the complaint by the informant mother of the minor victim, one Udairaj, a neighbour boy who was on talking terms with her minor daughter, aged about 16 years, on 03.07.2020 enticed her to come near a tube-well of one Ashok Singh alongwith her Adhaar Card, Bank Passbook and some cash. The victim met with Udairaj as suggested by him alongwith her Adhaar Card, Bank Passbook and cash of Rs.19,000/-. Udairaj took all the cash and papers from the victim and asked her to go alongwith the accused-applicant-Shabbir on his motorcycle with a promise of marrying with her. The present accused-applicant

took the victim girl to a deserted place near 'Saraiya Bazar Nahar' and committed rape, thereafter, left her near 'Pandey Baba Bazar', from where, Udairaj took the victim to her home and threatened her of life, if she tells this to anyone else.

5. Learned counsel for the bail-applicant in the above context argued that after registering first information report, police started investigation and the statements of complainant and witnesses were recorded, wherein prosecution finds no support. Learned counsel particularly impressed on annexure no.4 to the bail-application, the medical examination report, which was performed by the Doctor wherein it is reported that no external injury was found upon the body of the prosecutrix or any visible sign of sexual assault.

6. Learned counsel further submitted that the applicant is innocent, he has falsely been roped in the present case by the complainant, due to political rivalry as the family of the complainant and family of the applicant are on inimical terms with each other. He further argued that the named accused who enticed and took away the minor girl out of her natural guardian's custody, 'Udairaj' is excluded from the charge sheet, therefore, the entire prosecution case falls down being baseless. He pressed on this ground for release of the present accused-applicant on bail.

7. Learned A.G.A. in reply of the arguments from the side of accused-applicant submitted, it is obvious from the first information report that the victim is a member of schedule caste, a socially down trodden community by reason of which the complaint of her mother could be lodged by police only on 13.07.2020 in respect of sexual assault on her minor daughter dated 03.07.2020. After registration of F.I.R. only, the victim was subjected to medical examination, therefore, medical examination report cannot produce evidence of sexual violence committed on the victim after such a long gap.

8. He further submitted that the minor girl left her guardian's custody on the enticement of her friend Udairaj under impression that they were going to marry each other but the present accused-applicant-Shabbir who was present alongwith Udairaj at the prefixed meeting place, in aid, who when entrusted by Udairaj to provide a ride to her on motorcycle for another safe place, where Udairaj himself to reach, the accused-applicant took undue advantage of her helplessness and committed rape on her.

9. Learned A.G.A. argued, the allegation of rape is supported without any contradiction and anomaly in statement recorded by the Investigating Officer under Section 161 Cr.P.C. and further in statement when the victim was produced before the Magistrate Court.

10. Learned A.G.A. further argued that the annexure no.6 to the affidavit in support of bail-application itself establishes the age of the victim below 16 years, therefore, the penetrative offence under Section 3/4 of the POCSO Act is made out against the present accused-applicant and he is liable to be presumed to have committed the offence under Section 29 of the Act as well with culpable mind under Section 30 of the said Act. Nothing on record to prima facie rebut this presumption is placed by the applicant.

11. In the above context, learned counsel submits that the accused-applicant is ready and willing to face the trial and he is not in a position to flee away from the process of the court, he should be released on

bail subject to the conditions imposed by the Court with which he shall abide himself.

12. Protesting the bail plea as argued by learned counsel for the bail-applicant, learned A.G.A. for the State submitted that the present accused-applicant is a person of mischievous character. On the basis of instructions received to him, he has submitted that it is sufficient to show the instinct of the accused that he will affect adversely the witnesses and the evidences against him, if released on bail. Moreover, inimical relations between the parties is admitted.

13. Learned A.G.A. further submitted that even after the lodging of first information report, nature and behavior of the accused-applicant are enough to dis-entitle him for grant of bail at this stage.

14. Learned A.G.A. further submitted that the learned trial court need be directed to proceed expeditiously so as the complainant's evidences alongwith other material witness of the fact are recorded so that the complainant may be saved from being affected adversely by reason of long drawn trial.

15. On hearing the parties on the facts and circumstances and perusal of the materials on record, keeping in view the entirety of facts as emerging from the statements of witness annexed with the affidavit in support of the bail-application are also sufficient together to show, the accused-applicant is capable of tampering the evidences and affect the witness adversely.

16. On perusal of record, it also appears that the present accused-applicant is assigned the role of committing penetrative offence against a 16 years old minor child. The statements under Section 161 Cr.P.C. and 164 Cr.P.C. are intact to the same effect, the statement of the victim as such prima facie believable and reliable because of it's being at par on the higher pedestal of credibility like injured witness of an violent incident. Moreover, there is no explanation of the incident made in the affidavit in support of bail-application. Further, Section 29 of the POCSO Act makes a presumption of the offence, since the allegations made by the victim girl remains unrebutted, therefore, prima facie the presumption of commission of offence by the present accused-applicant is constituted. Moreover, the victim is a child and she might be exposed to the threat of life and living as well as undue pressure in the course of trial as the accused is also a native of the same locality.

17. On the basis of above discussions, I find no force in the submission of learned counsel for the bail-applicant and the bail-application is rejected at this stage.

18. Learned court below is directed to expeditiously proceed with the trial of the case as soon as practicably possible, within one year from the date, certified copy of the order is placed before it.

19. The present accused-applicant may have right to avail remedy of bail afresh after expiry of aforesaid period.

(2021)06ILR A381
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 15.06.2021

BEFORE

THE HON'BLE VIKAS KUNVAR SRIVASTAV, J.

Bail No. 1118 of 2021

Vishal Kharwar @ Veetu ...Applicant
Versus
State of U.P. ...Opp. Party

Counsel for the Applicant:
Madhulika Yadav, Savita Kumari

Counsel for the Opp. Party:
G.A.

(A) Criminal Law - Bail - Indian Penal Code, 1860 - Sections 307/34 & 302 - *Catching hold* - liability of co-accused in like offence - role and the liability of a person having *caught & hold* the victim cannot be different from the intention of the person committing murder and neither should his liability separable. (Para - 14,16)

Incident is day light incident - eye witnesses of incident - described - catching hold to the deceased - accused having caught and stopped - consequently murdered – presence /participation of all accused in the incident - involvement in co-operation with each other - commission of offence - common intention to commit murder - witnesses are neighbouring - naturally residing in the locality - knowing both, complainant and accused persons very well - presence and identification of the accused - probable and reliable .

HELD:-The entirety of facts as emerging from the statements of witness annexed with the affidavit in support of the bail-application , prima facie case of prosecution established against the present accused-applicant. Further the manner, incident was committed and the nature of the accused persons apparent from the evidences, all are sufficient together to show, the accused-applicant is capable of tampering the evidences and to affect the witness adversely. (Para - 17)

Bail application rejected. (E-6)

List of Cases cited:-

Kirpal & Bhopal Vs St. of U.P., AIR 1954 SC 706

(Delivered by Hon'ble Vikas Kunvar Srivastav, J.)

1. The case is called out through video conferencing.

2. Learned counsel for the bail-applicant Ms. Madhulika Yadav, Advocate and learned A.G.A. for the State Sri Suresh Kumar Tiwari, Advocate are connected through video conferencing in virtual hearing of the case.

3. The present bail-application is moved on behalf of accused-applicant-Vishal Kharwar @ Veetu, who is involved in Case Crime No.348 of 2020, under Sections 307/34 and 302 of I.P.C., registered at Police Station Chanda, District Sultanpur.

4. The occasion of present bail-application has arisen on rejection of bail-plea of the accused-applicant by learned Sessions Judge, Sultanpur vide order dated 17.12.2020.

5. Reading over the first information report lodged on 09.09.2020, learned counsel for the bail-applicant submits the prosecution case, that on 09.09.2020 at about 07:40 P.M., complainant's uncle namely Anoop Shukla went to the shop of one Harishchandra Kharwar for buying something, where a dispute occurred between her uncle and the said Harishchandra Kharwar. At that time, Harishchandra Kharwar alongwith his three sons namely Veeru Kharwar, Sheru Kharwar and Prince Kharwar attacked on her uncle and inflicted blows on neck, stomach and shoulders with a sharp edged weapon. On listening the hue and cry, father of the complainant namely Amit Kumar Shukla reached at the spot, where all the aforesaid four accused persons attacked on him also with the same weapon. Thereafter, all the accused fled away from the spot and complainant alongwith her family members when reached near the victims, she found that her

uncle Anoop Shukla was killed by them and her father Amit Shukla was severely injured.

6. Learned counsel for the bail-applicant argued for grant of bail to the present accused-applicant on the ground that his role is assigned in the first information report and the statement of witnesses is only of **catching hold** to the deceased. Secondly, the eye witnesses are falsely posed by the Investigating Officer as eye witnesses, otherwise their version, itself shows that they reached on the spot of incident only after the commission of the alleged offence. Learned counsel herself distinguished the role of present accused-applicant with that of the co-accused, 'Harishchandra Kharwar', his father on the basis that the witnesses stated him only who was armed with the knife as well as inflicted blows of the same on victims. Lastly, she argued about the enmity grown from the Panchayat elections, wherein the family of the accused-applicant did not support the complainant's side, in vengeance of which, the entire family is falsely implicated by the informant.

7. Learned A.G.A. for the State drew the attention towards the first information report and the statement of eye witnesses particularly 'Anurag Shukla' and 'Chandra Prakash Shukla'. He submitted that the presence and attendance of the said witnesses on the spot of incident at the relevant time when the offence was being committed is established by their statements. Moreover, the witnesses have stated that all the accused including the present accused-applicant were beating and dragging the deceased and his brother (injured in the incident), were inflicting blows of sharp edged weapon like knife. Other witnesses have also stated the knife in the hands of Harishchandra Kharwar specifically. The post mortem report, made annexure no.4 to the bail-application, contains the anti mortem injury reported by the doctor, who did autopsy on the dead body of Anoop Shukla, one of the victims. The injuries are reported as under:-

"2- Oral bleed

3- 4x0.5 x cavity deep incised wound on rt upper chest 1 cm below re lap clavicle.

4- 3x0.5 cm x cavity deep incised wound on rt chest 8 cm Below rt nupple.

5- 5x0.5 muscles deep incised wound below left chin.

6- 1x0.5 cm cavity deep incised wound below left abdomen. 6 cm at .....intestine come out.

7- 1x0.5 cm x skin deep incised wound on left shoulder."

8. In the above context of antimortem injures found on the body of deceased, learned A.G.A. submitted that they directly connect the manner of commission of offence as stated by the witnesses, by the accused-applicant and his companions because there are multiple incised wound on the body of the deceased. Secondly, the presence and attendance of 'Amit Shukla', the other victim of the incident, who is injured, is also prima facie proved by medical examination report. The report is as under:-

"Stab Injury (Rope of neck) & left back (L) Side Hemi plegia dlt A/H/O assault c knife"

9. Learned A.G.A. further submitted that the injuries on the body of deceased-victim as well as the injured victim in themselves make it clear that not only the Harishchandra Kharwar, one of the co-

accused but all the persons accused, named by the witnessed have caused them.

10. After hearing the rival contentions of the contesting parties to the case and perusal of materials on the record of the case, following facts are considered for the purpose of decision of applicant's prayer to release on bail.

11. It is noteworthy that all the accused have been arraigned under Sections 307/302 read with Section 34 of Indian Penal Code, 1860. The manner in which the eye witnesses of the incident dated 09.09.2020 have described the presence/participation of all the accused in the incident and their involvement in the co-operation with each other in the commission of the offence, their common intention to commit murder is prima facie obvious from their act and conduct. The incident is day light incident and witnesses are neighbouring, naturally residing in the locality and knowing both, the complainant and the accused persons very well. The presence and identification of the accused is probable and therefore reliable at this stage also, prima facie.

12. The contention of learned counsel for the bail-applicant that the incriminating article knife was stated by the eye witnesses in the hand of co-accused Harishchandra Kharwar only and rest of the co-accused including the present accused-applicant were assigned role of **catching hold** of the victim (deceased) Anoop Kumar Shukla, much vehemence is put over this in claiming the present accused-applicant's innocence.

13. It is argued that the role of the present accused-applicant is merely to **caught and hold** the deceased to detain him during the incident under the furtherance of common intention enshrined in Section 34 of the Indian Penal Code, 1860, his act was deemed to have been committed by all the accused in furtherance of common intention to murder the victim of the incidence (deceased) and he shall be deemed to be a joint participant in crime as well as equally liable for the murder. The role of present accused can not be separated for the purpose of prima facie ascertaining his innocence from the cumulative effect of the acts of all the accused, the killing of the deceased.

14. In ***Kirpal and Bhopal Vs. State of Uttar Pradesh*** reported in ***AIR 1954 SC 706***, para 6 explains the liability of co-accused in like offence. The relevant portion of para 6 is quoted hereunder :-

"The question, however, remains as to which of these three appellants are guilty and what offence has been committed by each. The learned Sessions Judge while holding all the three appellants responsible for causing the death of Jiraj was of the opinion that they could be guilty only under Section 304 IPC taken with Section 34 IPC on the ground that there is no evidence of any preconcerted or predetermined plan to kill the deceased Jiraj and that the blows were inflicted by the appellants in the course of a sudden fight in the passion without having taken undue advantage or acted in a cruel or unusual manner. The learned Judges of the High Court quite rightly pointed out that a preconcert in the sense of a distinct previous plan is not necessary to proved. The common intention to bring about a particular result may well develop on the spot as between a number of persons, with reference to the fact of the case and circumstances of the situation. Whether in a proved situation all the

individuals concerned therein have developed only simultaneous and independent intentions or whether a simultaneous consensus of their minds to bring about a particular result can be said to have been developed and thereby intended by all of them, is a question that has to be determined on the facts....."

15. If the present accused-applicant had not allegedly stopped with other co-accused (his brothers) by **catching hold** the deceased, he could have saved himself from the stabbing of the knife by the co-accused Harishchandra Kharwar or could have escaped from the scene of the incident, could have saved his life. But this could not happen because of the present accused having caught and stopped the deceased, consequently he was murdered.

16. In situation like that of the present case, when some people, in a dispute with another person start beating him, even when one or more of them become so violent and strike him with hand, kicks and fist or strangulate him or do some fatal act or wield lethal weapon in such a way to ensure his death and those who are still involved in the incident throughout knowing very well the probable consequences of the acts being done by their companions (co-accused), and **caught hold** the victim of the incident untill the other participants in crime ensures the victim's death or about to death by reason of the injury sustained in the course of evidences, the role and the liability of such a person having **caught & hold** the victim cannot be different from the intention of the person committing murder and neither should his liability separable.

17. On the basis of aforesaid discussions, the facts and circumstances and perusal of the materials on record, the entirety of facts as emerging from the statements of witness annexed with the affidavit in support of the bail-application, I find the prima facie case of prosecution established against the present accused-applicant. Further the manner, incident was committed and the nature of the accused persons apparent from the evidences, all are sufficient together to show, the accused-applicant is capable of tampering the evidences and to affect the witness adversely.

18. Without making comment as to the merit of the case, I find no force in the submission of learned counsel for the bail-applicant and the bail-application is ***rejected*** at this stage.

19. Learned court below is directed to **expeditiously proceed** with the trial of the case as soon as practicably possible, within one year from the date, certified copy of the order is placed before it. In deciding the case on merit, the trial court need not to be swayed away with any observation made by this Court in the order.

20. The present accused-applicant may have right to avail remedy of bail afresh after expiry of aforesaid period.

(2021)06ILR A385
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 21.06.2021

BEFORE

THE HON'BLE VIKAS KUNVAR SRIVASTAV, J.

Bail No. 1419 of 2021

Shameem Ahmad ...Applicant
Versus
State of U.P. ...Opp. Party

Counsel for the Applicant:
Jitendra Singh

Counsel for the Opp. Party:
G.A.

A. Criminal Law - Code of Criminal Procedure, 1973 - Section 439 - Indian Penal Code, 1860-Section 376-application-rejection- the version of complainant as stated in First Information Report, the statement of victim under Section 161 Cr.P.C. is quite similar to that version and thereafter the statement recorded by the Magistrate has also no deviation from the allegation of rape-The material fact that victim when came out of house in the night at about 11.00 p.m. to urinate she was caught hold by the accused and dragged in the nearby maize field, where she was raped by him- There is no deviation in the iteration of the material facts in all the three documents on record The parent themselves came out of the house when the victim did not come within a reasonably possible time, in search of daughter and heard her cry coming from the nearby maize field, father saw the accused in torch light who ran away from the spot- The argument of applicant with regard to consensual sexual intercourse does not stand on it's own legs, because the statement of victim as to "catching hold of her and dragging into maize field" is not improbable-The physical power of a man in comparison to that of a 18 years old girl is much more for committing such terrible act of abduction for the purpose of rape- - Looking into the sensitivity of the of matter, possibility of fleeing away of accused-applicant from the process of the court, possibility of adversely affecting the witnesses, prosecutrix, the application is liable to be rejected. (Para 1 to 20)

B. On principle the testimony of a victim of sexual assault stands on par with the testimony of an injured witness. Just like the testimony of the injured witness that of the victim of sex offence is entitled to great weight. But unlike the case of physical assault, corroboration in the form of eyewitness account of an independent witness cannot be expected in sex offence, having regard to the very nature of the offence. (Para 16,17)

C. Gender violence is most often unseen and is shrouded in a culture of silence. The causes and factors of violence against women include entrenched unequal power equations between men and women that foster violence and its acceptability, aggravated by cultural and social norms, economic dependence, poverty and alcohol consumption, etc. In India, the culprits are often known to the woman; the social and economic "costs" of reporting such crimes are high. General economic dependence on family and fear of social ostracization act as significant disincentives for women to report any kind of sexual violence, abuse or abhorrent behaviour. Therefore, the actual incidence of violence against women in India is probably much higher than the data suggests, and women may continue to face hostility and have to remain in environments where they are subject to violence. This silence needs to be broken. In doing so, men, perhaps more than women have a duty and role to play in averting and combating violence against women. (Para 18)

The application is rejected. (E-5)

List of Cases cited:

1. Sudha Singh Vs St. of U.P. & anr. (2021) AIR SC 2149

2. Rameshwar Vs St. of Raj. (1952) AIR SC 54

3. Aparna Bhat & ors. Vs St. of M.P. & anr. (2021) SCC SC 230

(Delivered by Hon'ble Vikas Kunvar Srivastav, J.)

1. The case is called out through video conferencing.

2. Learned counsel for the applicant, Sri Pramod Kumar Yadav, Advocate

appears through video conferencing in virtual hearing and learned A.G.A. for the State, Sri Prem Prakash, Advocate also appears through video conferencing in virtual hearing.

3. The present bail application is filed on behalf of the accused-applicant-Monish, who is involved in Case Crime No.169/2020 under Sections 376 of I.P.C., registered at Police Station - Makhi, District- Unnao.

4. The occasion of present bail application has arisen on rejection of bail plea of applicant by learned Sessions Judge, Unnao vide order dated 06.01.2021.

5. Stating the prosecution case against the accused, in brief, learned counsel stated the victim had gone out to urinate outside the house at 11:00 P.M. when the accused caught hold of her and raped her by dragging into the maize field. Noticing that she did not come back for a long time attending the call of nature in the house, her parents came out searching for her. They throwing torch light in the direction of victim's cry coming from the field called her loudly, then the accused ran away leaving the victim in a hurry.

6. On investigation, after lodging of the first information report with above facts, the charge-sheet against the accused is submitted in the Court under Section 376 of the Indian Penal Code.

7. Learned counsel stated, accused-applicant is in jail since 11.9.2020 for no fault of him. He pressed the application for release of the accused on bail on the ground that the victim was over 18 years of age at the time of incident and had consensual sexual intercourse of with the accused. False allegations have been made by her against the accused under the pressure of the parents. Her medical examination confirmed her age over 18 years. Learned counsel further argued that her medical examination also did not confirm rape. Her hymen is already old torned suggesting, she is used to sexual intercourse. It has also been argued that there are material contradictions in her statements recorded under Section 161 Cr.P.C. by the Investigating Officer and that recorded by the Magistrate in Court under Section 164 Cr.P.C. As such, learned counsel vehemently pressed that the allegation of rape is neither supported with her statement nor from medical evidence.

8. Learned counsel lastly argued that the accused-applicant has no criminal antecedent and therefore he should be released on bail.

9. Learned A.G.A. opposing the prayer for bail argued, the victim girl is educated upto class 10. She was of 18 years of age when the incident of rape with her happened. Immediately, thereafter lodging the first information report whatever fact she had stated that finds no deviation and the same is reiterated in statement recorded under Section 161 Cr.P.C. and thereafter in statement under Section 164 Cr.P.C. Since there is no material contradiction in the statement, therefore, the credibility of allegation as to the rape committed on her by the accused is established. So far as the medical examination is concerned, the same was done after four days from the date of incident on 10.9.2020. Thereafter, sign of rape could not be found, old torned hymen is not sign of being a girl used to the sexual intercourse. It generally torns up with the age, the age of victim is 18 years, which is material for this particular fact.

10. He lastly argued that the 18 years old girl was an easy victim for a well grown adult male of more than 23 years who was well acquainted about her and her parents. The law does not permit the medical evidence to over ride the statement of the victim of rape if found credible. Here the statements of the victim is reliable and credible, therefore, the accused cannot set forth his innocence. Moreover, he is a local resident and competent to adversely affect the witnesses as well as to coerce the victim and her parents therefore the bail application must be rejected, so as to provide fair trial.

11. Heard the rival contentions of the learned counsel for the applicant and the learned A.G.A., Sri Prem Prakash, Advocate, perused the version of complainant as stated in First Information Report, the statement of victim under Section 161 Cr.P.C. is quite similar to that version and thereafter the statement recorded by the Magistrate has also no deviation from the allegation of rape. The material fact that victim when came out of house in the night at about 11.00 p.m. to urinate she was caught hold by the accused and dragged in the nearby maize field, where she was raped by him. There is no deviation in the iteration of the material facts in all the three documents on record made Annexure Nos.1, 2 and 3 to the affidavit filed in support of the bail application. This is not denied in the aforesaid affidavit that the house from which the victim girl came out is the dwelling house of the victim and her parents. The parent themselves came out of the house when the victim did not come within a reasonably possible time, in search of daughter and heard her cry coming from the nearby maize field, father saw the accused in torch light who ran away from the spot.

12. Factors laid down in various judgment of Hon'ble the Supreme Court for grant or refusal of bail are as follows:-

"(i) Whether there was a prima facie or reasonable ground to believe that the accused had committed the offence;

(ii) nature and gravity of accusations;

(iii) severity of the punishment in the event of a conviction;

(iv) danger of the accused absconding or fleeing, if granted bail;

(v) character, ***behavior, means, position and standing of the accused;***

(vi) ***likelihood of repetition of the offence;***

(vii) reasonable apprehension of the witnesses being influenced; and

(viii) danger of justice being thwarted by grant of bail."

13. The bail applicant is a local resident and competent to adversely affect the witnesses as well as to coerce the victim and her parents, the matter is sensitive as it involves sexual assault and rape with a teenage girl residing in a village where generally the society is also not so protective for a girl as against the sexual offence.

14. Hon'ble the Supreme Court further in the case of ***Sudha Singh Vs. The State of Uttar Pradesh & Anr.*** reported in ***AIR 2021 SC 2149*** 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."

15. Learned counsel for the applicant blamed the statement to be false, but prima facie he seems to have this perception under scepticism, otherwise the statements of victim does not suffer from any basic infirmity and the "probabilities factor" does

not render it unworthy of credence at this stage of hearing on bail prayer where prima facie satisfaction as to establishing the prosecution case is sufficient. The statement of victim and the prosecution case as to the offence of rape is therefore prima facie worthy of credence, corroboration by medical evidence is not necessary.

16. In ***Rameshwar Vs. State of Rajasthan, AIR 1952 SC 54***, it is held :-

"*On principle the testimony of a victim of sexual assault stands on par with the testimony of an injured witness. Just like the testimony of the injured witness that of the victim of sex offence is entitled to great weight. But unlike the case of physical assault, corroboration in the form of eyewitness account of an independent witness cannot be expected in sex offence, having regard to the very nature of the offence."*

17. The argument of learned counsel for the applicant with regard to consensual sexual intercourse does not stand on it's own legs, because the statement of victim as to "catching hold of her and dragging into maize field" is not improbable. The physical power of a man in comparison to that of a 18 years old girl is much more for committing such terrible act of abduction for the purpose of rape. The victim was searched by the parents from the voice of her cry coming from the maize field. The statement made to the police to the above effect stood affirmed before the Magistrate also, where the girl was free to admit, if she was consensual in the sex with the accused. The affidavit in support of the bail prayer lack pleading to the effect of any such promiscuous character and nature of the victim. The argument of learned counsel in this regard is not tenable and the applicant very well shown prima facie to have committed the abduction and rape of the victim.

18. Hon'ble The Supreme Court in the case of ***Aparna Bhat & Ors. Vs. State of Madhya Pradesh & Anr.*** reported in ***2021 SCC SC 230*** in para 21 held as under:-

"21. Gender violence is most often unseen and is shrouded in a culture of silence. The causes and factors of violence against women include entrenched unequal power equations between men and women that foster violence and its acceptability, aggravated by cultural and social norms, economic dependence, poverty and alcohol consumption, etc. In India, the culprits are often known to the woman; the social and economic "costs" of reporting such crimes are high. General economic dependence on family and fear of social ostracization act as significant disincentives for women to report any kind of sexual violence, abuse or abhorrent behaviour. Therefore, the actual incidence of violence against women in India is probably much higher than the data suggests, and women may continue to face hostility and have to remain in environments where they are subject to violence. This silence needs to be broken. In doing so, men, perhaps more than women have a duty and role to play in averting and combating violence against women."

19. Looking into the sensitivity of the of matter, possibility of fleeing away of accused-applicant from the process of the court, possibility of adversely affecting the witnesses, prosecutrix, the application is liable to be rejected.

20. Without making comment as to the merit of the case, I find no force in the submission of learned counsel for the bail-

applicant and the bail-application is ***rejected*** at this stage.

21. The trial court is therefore directed to record the statements of prosecution witnesses within six months from the date, certified copy is placed before it. However, learned trial court while deciding the case on merit need not to swayed away with the observations made in this order.

(2021)06ILR A390
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 16.06.2021

BEFORE

THE HON'BLE VIKAS KUNVAR SRIVASTAV, J.

Bail No. 5451 of 2018

Ajay Kumar ...Applicant
Versus
State of U.P. ...Opp. Party

Counsel for the Applicant:
Sudhakar Mishra, Atul Verma, Hari Krishna Verma, Shitla Prasad Tripathi

Counsel for the Opp. Party:
G.A.

(A) Criminal Law - Indian Penal Code, 1860 - Sections 323, 427, 328, 376, 504, 506, 354-D, 392 & 406 , The Code of criminal procedure, 1973 - Section 161 & 164 , Information Technology Act,2000 - Section 67 - Publishing of information which is obscene in electronic form - Object of bail - neither punitive nor preventative - to secure the appearance of the accused person at his trial by reasonable amount of bail - valuable right of personal liberty and the fundamental principle not to disbelieve a person to be innocent unless held guilty and if he is not arraigned with the charge of an offence for which the law has put on him a reverse burden of proving his innocence.(Para - 24,26)

Accused - applicant was a bus driver - forcibly making sexual contact with complainant - filming by mobile videography - threatening with illegal demand of money - blackmailing complainant - physically assault - told her senior in the institution - statement recorded by the Investigating Officer - affirms traumatic situation created by complainant from his acts and mischief and other witness - accused applicant in jail - bail application before district judge - rejected - hence present bail application.

HELD:-Without expressing any opinion on the merits of the case and considering the nature of accusation, complicity of the accused-applicant, gravity of the offence and the severity of punishment in case of conviction and the period for which he is in jail, it would be better to leave on the wisdom of the trial court all these things on merit. Accused-applicant is entitled to be released on bail. Trial court is directed to conclude the evidence of the witnesses of both the side and to decide the case expeditiously in accordance with law.(Para - 27,28)

Bail application allowed. (E-6)

List of Cases cited:-

1. Sanjay Chandra Vs C.B.I., (2012) 1 SCC 40 - [Spectrum Scam Case]

2. Dataram Singh Vs St. of U.P. & ors. , (2018) 3 SCC 22

(Delivered by Hon'ble Vikas Kunvar Srivastav, J.)

1. The case is called out through video conferencing.

2. Learned counsel for the bail-applicant Sri Atul Verma, Advocate and learned A.G.A. for the State Sri Prem Praksh, Advocate are connected through video conferencing in virtual hearing of the case.

3. The present bail-application is moved on behalf of accused-applicant-Ajay Kumar, who is involved in Case Crime No.0117/2018, under Sections 323, 427, 328, 376, 504, 506, 354-D, 392, 406 of I.P.C. and Section 67 of Information Technology Act, registered at Police Station Mahila Thana Hazaratganj, District Lucknow.

4. The occasion of present bail-application has arisen on rejection of bail-application of accused-applicant by learned Additional District and Sessions Judge, F.T.C.-Ist, Lucknow vide order dated 30.05.2018.

5. Learned counsel for the bail-applicant Sri Atul Verma, Advocate stated about the prosecution story as emerged from the first information report. In brief, the report is lodged against the present accused-applicant-Ajay Kumar Pal and his wife. Ajay Kumar Pal, the present accused-applicant was a bus driver attached with S.G.P.G.I., Lucknow. According to the victim of the case, the complainant met first of all from the bus driver, Ajai Kumar Pal at Charbagh, Lucknow because during city commute from Charbagh to her house, while boarded in the bus, her phone was missed therein, being driver of the bus, the present accused-applicant helped her in searching the phone. Subsequently, familiar relations were developed between them and accused-applicant used to visit the house of complainant to meet her family members also.

6. It is further complained of that on the pretext of some economical problems, the accused-applicant borrowed Rs.20,000/- from the mother of the complainant under promise to pay back the same within two months, thereafter, approximately Rs.10,000/- also severally from the family members he borrowed, time to time. The accused-applicant used to be on telephonic conversation from the complainant and her mother also and time to time used to visit them in their house. After some time, the present accused-applicant started ringing the telephone of complainant irrespective of time and enumerably also.

7. It is further complained of that when the borrowed money was not paid back either totally or partially by the accused-applicant to the mother of the complainant, she insisted to get the money back from him. The complainant when asked the applicant to pay the money due upon him, he refused to do so, pretending him to be in economical inability at that time and also threatened her not to tell the refusal from paying back to her parents. Subsequent thereto, on further asking to return the money, the accused-applicant once beaten her, snatched her phone and broken laptop but this could not be conversed to the parents by the victim because she was feared of the enmity as she was lonely child of her parents and did not want to create any mental tension for them. However, the complainant began to avoid picking the phone calls of the accused-applicant, whereupon he started to visit her in office, threateningly calling her outside the office.

8. Once, during such mischievous visit, the accused-applicant administered her intoxicating substance and when she came under the effect of intoxication, he sexually abused her in bus. During that incident, the accused-applicant filmed the entire incident of sexual abuse through videography. On the basis of videographed incident of sexual abuse, he began to

threaten her of social defame and to prove her an unchaste lady and to spoil her life.

9. All these things were told by the complainant to her senior in office, subsequent thereto, the accused-applicant was removed from bus driving. Even then, the accused-applicant continued to make phone calls to the family members namely the sister-in-law, the mother and the nephew to hurl threats on telephone. He also threatened the father of the complainant. Once he reached at the office of the complainant in drunken position and from there, he chased her upto the house of the complainant and began to abuse her in filthy language. He threatened to kill the parents of the complainant.

10. The accused-applicant forcibly took away with him a two wheeler of the complainant alongwith him. The complainant and her family members, under the fear of their life, fame and reputation, they lodged an first information report but did not name the accused-applicant therein.

11. The accused-applicant further continued with his mischiefs and then began to talk with the friends of the complainant telling her an unchaste lady and even succeeded in breaking a marriage proposal from abroad. He further threatened that he will not leave any stone unturned in defaming her in the society. The family members and well wishers supported the complainant but the accused-applicant began to blackmail her asking money for his illegal gratification, if the money is not delivered to him, he will defame and will ensure the killing her family. Ultimately, the complainant lodged the first information report on 20.08.2016 against the accused-applicant.

12. Learned counsel for the bail-applicant further submitted that virtually all the allegations are false, the money was actually borrowed by the family members of the complainant themselves and when they could not return the money by reason of their economical distress they wanted to get rid from the demand of pay back by the accused-applicant, therefore, by all the hook or crook, even by labeling the false blame of sexual exploitation, concocted a story in lodging F.I.R. otherwise as and when required, the accused-applicant and his family members extended their help physically, financially and socially to the family of complainant. This is evident from a bank transaction through bank demand draft of Rs.33,657/- dated 13.06.2016 needed on account of fees to the Amity University for the study of complainant.

13. Learned counsel further argued that so far as the allegations as to the sexual exploitation is concerned, is also incorrect, the complainant herself was in habit of sexual intercourse and she developed physical relations with the accused-applicant on her own from the last one year before the date of registration of F.I.R. Everything between them was consensus, even the voluntary exchange of money, physical and social help, intimacy of every kind within the aforesaid period of one year by reason of the mutual live in relations.

14. Learned counsel raised an objection as to the non-availability of medical evidences of rape, as no spermatozoa were found in the sample of the vaginal swab.

15. Learned counsel lastly submitted that the accused applicant is languishing in jail since 19.03.2018 for no fault of him, he has no criminal antecedents and he is

resident of Sultanpur and during the course of employment, he was resident of Mohanlal Ganj, Lucknow but since his employment is terminated by reason of present offence, he is bound to live in Sultanpur, however, he is not in a position of fleeing away from the process of the Court.

16. Learned counsel further submitted that the accused-applicant is ready and willing to face the trial and for this purpose, he is ready and willing to furnish proper bail bonds and surety bonds.

17. So far as filming of the sexual exploitation in the bus by mobile videography is concerned, learned counsel for the bail-applicant submitted that there is no electronic evidence in this regard, therefore, the allegations as to the blackmailing on the basis of videographed article is baseless.

18. On the other hand, learned A.G.A. Sri Prem Prakash, Advocate submitted that the argument of learned counsel for the bail-applicant is of no avail with regard to the allegations of the rape because the statements of the victim under Section 161 and 164 Cr.P.C. are intact with regard to her traumatic sexual exploitation. This is also to be kept into mind that the complainant was the only child of her parents and was suffering from the fear of unsafeness and lack of any support to counter the mischief of the bail-applicant.

19. Learned A.G.A. in continuation of his argument stated hereinabove submitted that the fact of forcibly making sexual contact with the complainant, filming the same by mobile videography, threatening on the basis of filmed videographed of sexual exploitation coupled with illegal demand of money, blackmailing the complainant as well as to physically assault her was told by her to her senior in the institution, Sri Abhisek Mishra, whose statement is recorded by the Investigating Officer and made annexure to the counter affidavit as CA-3. He affirms the traumatic situation created by complainant from his acts and mischief and the other witness, the brother of the victim has also stated the same.

20. As such, learned A.G.A. submits that the entire allegations made in the first information report prima facie found support of two witnesses on the basis whereof, the offence under Sections 323, 427, 328, 376, 504, 506, 354-D, 392, 406 of I.P.C. and Section 67 of Information Technology Act are arraigned against the present accused-applicant. So far as the videograph of sexual exploitation of complainant is concerned, the same was done by the accused-applicant by a device like phone or any other thing which might be in the possession and power of the accused-applicant and unless he discloses the same, at the stage of bail, it cannot be produced before the Court or any evidences with that regard also.

21. However, learned A.G.A. submitted that entire case is investigated and culminated into submission of charge sheet before the Court. All the evidences are collected and produced before the Court. He has not denied that no evidence with regard to the Section 67 of the I.T. Act is produced before the Court till date.

22. Learned A.G.A. submitted that the offence with which the accused-applicant is arraigned, is a social offence particularly against a woman and in a patriarchal society, the man always thinks himself to

be a master of woman. Accused exploited finding the victim, lonely child of the parents working for livelihood and therefore found her as a poor victim for her sexual gratification. It cannot be presumed at this stage that applicant is innocent as he himself admitted the visiting terms as well as telephonic conversation terms with the complainant and her family members also. It is also admitted that he used to be in financial transaction and exchange of money with the family members and the victim herself time to time. The fact that who was beneficiary of the money of the transaction either physically or through bank is a question of evidence which is to be decided by the trial court during the course of examination of witnesses. However, the version of accused-applicant that he helped monitorily time to time to the victim's family and the victim herself is an advanced move by him against the version in F.I.R. that he borrowed actually Rs.20,000/- from the mother of the victim and subsequently Rs.10,000/- time to time and severally from the other family members of the victim.

23. On the ground of all these facts and circumstances referred in the arguments made by learned A.G.A., it is submitted by him that the bail-application of the present accused-applicant need be rejected.

24. On hearing the rival contentions of the contesting parties and perusal of record, it is also considered that not only the chargesheet is submitted in the Court but the prosecution evidence has also substantially recorded by the trial court. The purpose of the bail is neither to punish the accused-applicant by keeping him in jail or to teach him a lesson but the object of the bail is to ensure the presence of the accused-applicant during the trial. Hon'ble the Supreme Court in para 21, 22 and 23 of the judgment given in the case of ***Sanjay Chandra Vs. Central Bureau of Investigation*** reported in ***[(2012 1 SCC 40)-(Spectrum Scam Case)],*** has laid down certain objects of bail under Section 437 & 439 of the Cr.P.C. which are as follows:

"21. In bail applications, generally, it has been laid down from the earliest times that the object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it is required to ensure that an accused person will stand his trial when called upon. The courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty.

22. From the earliest times, it was appreciated that detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In this country, it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances.

23. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that

any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson."

25. In the context of above observation of Hon'ble the Supreme Court another considerable fact is that there is no possibility of adversely influencing the witnesses, as the most prominent witness, the victim herself as PW-1 is examined and the trial is still running. PW-2 i.e. the supporting witness of the victim is also examined and rest of the formal witnesses are being examined. This is also relevant in the matter that the accused-applicant is in jail since 19.03.2018 and his family members are not living in Mohan Lal Ganj, recently they are residing in Sultanpur, therefore even a bleak possibility of adversely influencing the witnesses is not existing in the case.

26. Keeping into mind the valuable right of personal liberty and the fundamental principle not to disbelieve a person to be innocent unless held guilty and if he is not arraigned with the charge of an offence for which the law has put on him a reverse burden of proving his innocence as, held in the judgment of Hon'ble the Supreme Court in ***Dataram Singh Vs. State of U.P. and Others reported in [(2018) 3 SCC 22]***, I find force in the submission of learned counsel for the bail-applicant to enlarge him on bail.

27. However, learned trial court is directed to conclude the evidence of the witnesses of both the side and to decide the case expeditiously in accordance with law reasonably within six months from the date, the certified copy of this order is received to it.

28. Considering the rival submissions of learned counsel for the parties, without expressing any opinion on the merits of the case and considering the nature of accusation, complicity of the accused-applicant, gravity of the offence and the severity of punishment in case of conviction and the period for which he is in jail, it would be better to leave on the wisdom of the trial court all these things on merit, therefore, I find force in the argument of learned counsel for the accused-applicant. The accused-applicant is entitled to be released on bail in this case.

29. Let applicant- ***Ajay Kumar*** be released on bail in Case Crime No.0117/2018, under Sections 323, 427, 328, 376, 504, 506, 354-D, 392, 406 of I.P.C. and Section 67 of Information Technology Act, registered at Police Station Mahila Thana Hazaratganj, District Lucknow on his furnishing a personal bond worth Rs. 1,00,000/- (one lac) and two reliable sureties of the like amount to the satisfaction of the court concerned subject to following additional conditions, which are being imposed in the interest of justice:-

(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.

30. Office is directed to send the trial Court, the direction given in the order with regard to expeditious disposal forthwith.

(2021)06ILR A396
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.06.2021

BEFORE

THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Crl. Misc. Bail Appl. No. 20591 of 2021

Ravindra Pratap Singh @ Pappu Shahi ...Applicant

Versus

State of U.P. ...Opp. Party

Counsel for the Applicant:
Sri Harinarayan Singh, Sri Rakesh Kumar Srivastava, Sri Mithilesh Kumar Tiwari, Sri Anoop Tiwari

Counsel for the Opp. Party:
G.A.

A. Criminal Law- Code of Criminal Procedure,1973-Section 439, 151/107/11 - Indian Penal Code, 1860 - Section 306 – जिलाधिकारी ने कार्यवाही करते हुए सार्वजनिक भूमि पर कई वर्ष पूराने कृषि पट्टों को निरस्त कर दिया था, जिनसे मृतक के पिता (शिकायतकर्ता) व अन्य ग्रामवासी प्रभावित हुए थे कथित रूप से सरकारी कार्यमें अड़चन पहुँचाने के कारण व सहअभियुक्त पर हमला करने के कारण कुछग्रा मवासियों के विरूद्ध प्रथम सूचना रिपोर्ट पंजीकृत हुई थी जिस पर अन्वेषण के बाद आरोप पत्र प्रेषित भी किये जा चुके है, जिनमे मृतक व शिकायतकर्ता भी शामिल है।आवेदक ने अपनी सुरक्षा के लिए पुलिस अधीक्षक के पास गुहार लगाई थी व कथित रूप से आवेदक व मृतक की कई वार्ता भी हुई थी जिसमें उसने क्षमा याचना करी थी।इसी क्रम में कथित रूप से मृतक व जिलाधिकारी की भी वार्ता हुई थी जिसमें मृतक ने अपनी परेशानियाँ साझा करी थी परन्तु उसकी प्रार्थना पर कोई कार्यवाही नहीं हुई थी। आवेदक वर्तमान में सभासद है तथा समाज में उसकी प्रतिष्ठा और प्रभाव भी है तथा उसका आपराधिक इतिहास भी है, जो वर्ष 2004 से अब तक 6 आपराधिक मुकदमों का है न्यायालय के समक्ष समस्त जानकारी न देना एक गंभीर विषय है परन्तु वर्तमान प्रकरण में आवेदक ने अपने 6 आपराधिक मुकदमों की घोषणा की है, अतः एक अपराध का विवरण न देने की भूल दुर्भावनापूर्ण नहीं मानी जा सकती है। अभियोजन का साक्ष्य प्रमुख्तयः आत्महत्या पत्र व श्रव्य अंश पर आधारित है जिसमें आवेदक व सह अभियुक्त पर मृतक को परेशान करने का कथित साक्ष्य है तथा जिसके कारण मृतक ने आत्महत्या की थी, परन्तु जैसा पूर्व में उल्लेखित किया गया है कि आत्महत्या के दुष्प्रेरण के लिए अपराधी को दुष्प्रेरण का कृत किसी

व्यक्ति को इस कृत का कारित करने के लिए उकसाने के लिए, आपराधिक मनोवृत्ति के साथ कि गयी कोई अत्युक्ति होनी चाहिये और इन कारणों की अनुपस्थिति की स्थिति में अपराध कारित होना नहीं माना जायेगा मृतक का आत्महत्या पत्र में यह लिखा गया है कि वो आवेदक व सह अभियुक्त द्वारा उसको आपराधिक मुकदमें मे कथित रूप से झूँठा फंसाने के कारण, मानसिक तनाव से ग्रस्त था।श्रव्यअंश में भी मृतक अपने आपको इस आपराधिक प्रकरण से मुक्त होने की याचना करता हुआ प्रतीत होता है। परन्तु आवेदक का लहजा सख्त रहता है तथा अभद्र भाषा का प्रयोग भी करता है। ऐसा प्रतीत होता है कि मृतक भूमि पट्टा के निरस्त होने के आदेश से ज्यादा अपने ऊपर लगाये गये आपराधिक मुकदमें से परेशान था जिसके कारण उसकी नौकरी पर प्रतिकूल प्रभाव पड़ सकता था। परन्तु वर्तमान स्तर पर यह नहीं कहा जा सकता है मृतक के ऊपर लगाया गया आपराधिक मुकदमा झूठा था जबकि उसकी मृत्यु से पहले ही उसमें आरोप पत्र भी दाखिल किया जा चुका था। मृतक ने अपने जीवनकाल में उपरोक्त आपराधिक मुकदमों के निदान हेतु कोई भी विधिक प्रक्रिया का उपयोग नहीं किया गया था। इसके अतिरिक्त "समाधान दिवस" पर अशांति फैलाने व संज्ञेय अपराध कारित होने की आशंका को देखते हुए मृतक व अन्य के विरूद्ध धारा 151/107/114 दं०प्र०सं० के अंतर्गत की गयी कार्यवाही को भी प्रथम दृष्टवा दुर्भावनापूर्ण या आवेदक के प्रभाव के कारण किया जाना प्रतीत नहीं होता है।जैसा पूर्व मे उल्लेखित किया गया है, दुष्प्रेरण का अर्थ उकसाना, प्रवृत्त करना, उत्तेजित करना, भड़काना या कोई कार्य करने के लिए बढ़ावा देना है और इन सब के पीछे अभियुक्त की आपराधिक मनोवृत्ति का होना भीअनिवार्य है तब ही आत्महत्या के दुष्प्रेरण का अपराध कारित होना माना जायेगा। वर्तमान प्रकरण में प्रथम दृष्टया पट्टा निरस्तीकरण की कार्यवाही विधिकी उचित प्रक्रिया के अन्तर्गत हुई है,जिसके विरूद्ध पीड़ित व्यक्ति को उचित विधि प्रक्रिया के अंतर्गत उपचार भी प्रदान किया गया है।यहाँ यह भी स्पष्ट करना आवश्यक है कि आवेदक ने मृतक के विरूद्ध कोई भी शिकायत पुलिस के समक्ष नहीं करी है।जो भी आपराधिक मुकदमा मृतक के विरूद्ध पंजीकृत हुआ है,उसका शिकायतकर्ता सह अभियुक्त जितेन्द्र कन्नौजिया जिसको इस न्यायालय ने अंतरिम अग्रिम जमानत दे रखी है या विभाग के कर्मचारी गण हैं, केवल इस कारण से कि आवेदक का नाम आत्महत्या पत्र मे उल्लेखित है तथाकथित श्रव्य अंश में मृतक व आवेदक के बीच वार्ता में मृतक,याचना कर रहा है व आवेदक सख्त लहजे मे बोल रहा है,प्रथम दृष्टया यह नहीं माना जा सकता कि आवेदक के ऊपर लगाया गया आत्महत्या के दुष्प्रेरण का आरोप पूर्ण रूप से सत्य है, इसके प्रतिकूल प्रथम दृष्टया पूर्व के विश्लेषण के आधार पर तथा धारा 306 भा०द०सं० के अवयवों को ध्यान में रखा जाये तो प्रथम सूचना रिपोर्ट व उपलब्ध प्रपत्रों तथा धारा 306 के अवयवों के बीच संबंध स्थापित हुआ प्रतीत नहीं होता है, बल्कि इसके विपरित वियोजित प्रतीत होता है। जमानत का प्रार्थना पत्र स्वीकार किये जाने योग्य है। अतः स्वीकार किया जाता है। (E-5)

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

1. वर्तमान में, कोविड-19 वैश्विक महामारी के कारण उत्पन्न विषम परिस्थितियों के कारणवश, इस अवकाश पीठ ने अप्रत्यक्ष प्रणाली (वर्चुअल मोड) के माध्यम से, वर्तमान जमानत प्रार्थना पत्र की सुनवाई सम्पन्न करी।

<u>अभियोजन कथानक</u>

2. वादी श्री रामवचन (शिकायतकर्ता) ने एक प्रथम सूचना रिपोर्ट (मुकदमा अपराध संख्या - 0085 वर्ष 2021), धारा 154 दंड प्रक्रिया संहिता के तहत, जितेन्द्र कन्नौजिया, वर्तमान अध्यक्ष व रवीन्द्र प्रताप शाही उर्फ पप्पू शाही, वर्तमान सभासद (यहाँ आवेदक) के विरूद्ध भारतीय दंड संहिता की धारा 306 के अपराध कारित होने की सूचना, थाना-महुली, जिला- संत कबीर नगर में दिनांक 15.03.2021 समय 02.28 बजे को इस आशय से पंजीकृत कराई कि *"प्रार्थी रामबचन पुत्र दशरथ साकिन नगर पंचायत हरिहरपुर वार्ड नं० 06 जवाहर नगर थाना महुली का स्थायी निवासी है। प्रार्थी के नाम जगदीशपुर गौरा में भूमि आवंटन किया गया था जिसे वर्तमान अध्यक्ष जितेन्द्र कन्नौजिया व पूर्व अध्यक्ष व वर्तमान सभासद पप्पू शाही द्वारा स्थानीय अधिकारियों को अपने साजिश में लेकर पट्टा निरस्त करा दिया गया जिससे आहत होकर अन्य किसानो के साथ मेरा लड़का रघुवीर उम्र 22 वर्ष भी जनपद व तहसील पर पहुंचकर विरोध प्रदर्शन कर रहा था जिससे खार खाकर नगर पंचायत के रवीन्द्र प्रताप शाही उर्फ पप्पू शाही जितेन्द्र कन्नौजिया व अन्य सहयोगियों द्वारा मानसिक तनाव व यातना तरह तरह से दे रहे थे। जिससे तंग आकर मेरे लड़के रघुवीर ने जो वर्तमान समय में उन्नाव जनपद के तकीया स्टेशन गेट मैने के रूप में कार्यरत था जहर खाकर अपनी जीवन लीला समाप्त कर लिया जहर खाने से पूर्व रघुवीर ने अपना सुसाईड नोट भी लिखा है जो उन्नाव जनपद के सम्बन्धित थाने पर पोस्टमार्टम रिपोर्ट के साथ जमा है। अतः आप से सादर अनुरोध है कि रवीन्द्र प्रताप शाही, जितेन्द्र कन्नौजिया व अन्य प्रताड़ना से समलिप्त के खिलाफ अभियोग पंजीकृत कर दण्डात्मक कार्यवाही करने की कृपा करे।"*

<u>प्रकरण का संक्षेप में तथ्यात्मक प्रारूप-</u>

3. प्रकरण के तथ्यों, परिस्थितियों व पत्रावली पर प्रस्तुत दस्तावेजों के दृष्टिगत

प्रकरण के तथ्यात्मक प्रारूप को वर्तमान जमानत प्रार्थना पत्र के उचित निस्तारण के लिए वर्णित करना आवश्यक है, जो संक्षेप में निम्न हैः-

(क) आवेदक, रविन्द्र प्रताप शाही उर्फ पप्पू शाही घटना के समय नगर पंचायत हरिहरपुर के राजस्व ग्राम सवापार के वार्ड नं० 7 से निर्वाचित सभासद था तथा सह अभियुक्त जितेन्द्र कन्नौजिया घटना के समय अध्यक्ष, नगर पंचायत, हरिहरपुर था।

(ख) मृतक (रघुवीर) उम्र 22 वर्ष, घटना के समय उन्नाव जनपद के तकिया रेलवे स्टेशन पर गेटमैन के रूप में कार्यरत था व अपने सरकारी आवास, रेलवे स्टेशन तकिया, जिला उन्नाव में रहता था। जहाँ उसने घटना के दिन जहर खा लिया था तथा उपचार के दौरान उसकी मृत्यु हो गयी।

(ग) जिलाधिकारी, संतकबीर नगर ने उभयपक्ष को सुनकर एक सकारण आदेश दिनॉक 27.11.2019 के माध्यम से ग्राम जगदीशपुर गौरातप्पा माडर, परगना महुली पूरब, तहसील घनघटा, स्थित गाटा संख्या 337 मि०, 788, 433क एवं 467 के भूखण्डों पर पूर्व (वर्ष 1976 व 1993) में आवंटित कृषि पट्टों को सार्वजनिक भूमि होने के कारण व मात्र राजस्व अभिलेखों में जंगल की भूमि दर्ज होने कारण पट्टा देने के आदेश को जमीदारी विनाश अधिनियम की धारा 132 के अंतर्गत प्रारम्भ से शून्य प्रभावी होने के कारण निरस्त करने का आदेश पारित किया था। यह प्रक्रिया उच्च न्यायालय के द्वारा एक जनहित याचिका में पारित कतिपय आदेश के फलस्वरूप हुई थी, जिसमें सहअभियुक्त जितेन्द्र कन्नौजिया ने गाँव सभा की ओर से गाँव सभा को भी एक पक्षकार बनाने के लिए आवेदन दाखिल किया था।

(घ) पत्रावली से ऐसा प्रतीत होता है, पीड़ित रघुवीर, अपने गाँववासियों व अपने पिता (शिकायतकर्ता) के बहुत पुराने कृषि पट्टों के निरस्त होने के कारण गांववासियों के साथ हमदर्दी रखता था, इसलिए गाँववासियों/ किसानों के साथ इस आदेश का विरोध करता था, इसी कारण उसने जनपद व तहसील के स्तर पर गांववासियों के साथ धरना, विरोध प्रदर्शन में भागीदारी भी की थी। इन सबको यह संदेह था कि इस पट्टा निरस्तीकरण की कार्यवाही के पीछे वर्तमान आवेदक व सह अभियुक्त की ही साजिश थी। इस आदेश को अधिनियम के अंतर्गत चुनौती दी गई है या नहीं, ऐसा बहस या पत्रावली से स्पष्ट नहीं है। इसी संबध में 23.1.2021 को पीड़ित व अन्य के विरूद्ध, समाधान दिवस पर अशान्ति फैलाने व संज्ञेय अपराध की आशंका उत्पन्न होने के कारण थानाध्यक्ष महुली ने रिपोर्ट चलानी अन्तर्गत धारा 151/107/116 दं० प्र०सं० बनाई तथा उन्हें गिरफ्तार भी किया गया तथा उन्हें जमानत मुचलके पर पाबन्द किया गया।

(ड़) पत्रावली से यह भी विदित होता है कि, जब पंचायत हरिहरपुर के कर्मचारी व राजस्व विभाग के कर्मचारियों द्वारा विवादित पट्टा भूमि का कब्जा लेने की कार्यवाही हो रही थी तब

गाँववासियों ने कर्मचारियों पर लाठी डण्डा लेकर हमला कर दिया तथा इस घटना पर कर्मचारियों द्वारा गांववासियों के विरूद्ध प्रथम सूचना रिपोर्ट, दिनॉक 19.11.2020 को (सं० 0364 वर्ष 2020) पंजीकृत कराई गयी व अन्वेषण के उपरान्त अन्वेषण अधिकारी ने द०प्र०सं० की धारा 173 के अंतर्गत धारा 147,323,504,506,354,353 भा०दं०सं० के अंतर्गत आरोप पत्र दि० 19.11.2020 भी प्रेषित किया जा चुका है। जिसमें पीड़ित व शिकायतकर्ता (पिड़ित के पिता) भी आरोपित है।

(च) पत्रावली से सम्यक अध्ययन से यह भी विदित होता है, कि वर्तमान प्रकरण में सह अभियुक्त जितेन्द्र कन्नौजिया ने एक प्रथम सूचना रिपोर्ट (सं० 0005 वर्ष 2021) दिनॉक 03/01/2021 को थाना-महुली, जिला-संतकबीर नगर में मृतक व अन्य के विरूद्ध धारा 143,323,504,506 भा०दं०सं० व धारा 3(1)4, 3(1)(घ) अनुसूचित जाति व अनुसूचित जनजाति (नृशंसता निवारण) अधिनियम 1989 के अन्तर्गत अपराध घटित होने की सूचना पंजीकृत करायी कि कथित रूप से इन्होंने 29.12.2020 को सायं 6 बजे शिकायत कर्ता जितेन्द्र कन्नौजिया पर डंडो, लात मुक्कों से मार पीट करी व जाती सूचक शब्दों का इस्तेमाल करा। अन्वेषण अधिकारी नें अन्वेषण के उपरान्त इस प्रकरण में भी पीड़ित व अन्य के विरूद्ध आरोप पत्र संख्या 01 दिनांक 21.02.2021 को सक्षम न्यायालय को प्रेषित कर दिया गया, जिस पर सक्षम न्यायालय ने 08.03.21 को अपराध का प्रसंज्ञान भी ले लिया गया है। जिसमें मृतक भी एक आरोपी था।

(छ) अन्वेषण के दौरान अभियोजन ने कुछ श्रव्य अंश (आडियो किल्प) बरामद की है, जिसका उल्लेख सत्र न्यायालय ने आवेदक के जमानत प्रार्थना पत्र को निरस्त करते हुए विस्तृत रूप से किया है। इसमें कथित रूप से मृतक, आवेदक/अभियुक्त से बात करता हुआ सुना जा सकता है। जिसमे मृतक आवेदक से क्षमा याचना कर रहा है, परन्तु आवेदक धमकी भरे लहजे में बात कर रहा है। एक श्रव्य अंश (आडियो किल्प) में मृतक का कथित रूप से वर्तमान जिलाधिकारी से वार्ता का भी है। जिसमें भी मृतक याचना करता हुआ सुनाई देता है। इन कथित श्रव्य अंशों की न्यायालयिक प्रयोगशाला की कोई जाँच आख्या अभी पत्रावली पर उपलब्ध नहीं हैं।

(ज) स्टेशन अधीक्षक, उ०रे० तकिया ने 14.03.2021 को थानाध्यक्ष विहार, जिला उन्नाव को पत्र लिखकर सूचित किया कि पीड़ित जब 13.3.2021 को अपनी ड्यूटी पर नहीं आया तब उसके सरकारी आवास पर स्टाफ को करीब 7.30 सायं बजे भेजा तो जानकारी मिली कि पिड़ित घर पर था और उसने बोला कि उसने जहर खा लिया हैं, उसे अस्पताल ले चलो। पिड़ित को तुरन्त सी०एच०सी०, पाटन भेजा गया व 100 नं० पर सूचना भी दी गयी व प्राथमिक उपचार किया और जिला अस्पताल उन्नाव को रैफर किया गया, जहाँ उपचार के दौरान उसकी मृत्यु हो गयी। अतः उचित कार्यवाही करने की प्रार्थना की गयी। तदनुसार

पुलिस ने सामान्य दैनिक में 14.03.2021 को 10.26 पर इस सूचना को थाना विहार, जिला उन्नाव की रोजनामचा सं० 019 पर अभिलेखित किया ।

(झ) इसके उपरान्त पिड़ित के शव की मृत्य समीक्षा, धारा 174 दं०प्र०सं० के प्रावधानों के अंतर्गत 14/03/2020 को पंचानों (एक पंचान पिड़ित के पिता/शिकायतकर्ता व अन्य उसके रिश्तेदार थे) के उपस्थिति में किया गया। राय पंचान के अनुसार मृतक रघुवीर की मृत्यु जहर खाने से हुयी प्रतीत हुई मानी गई फिर भी सही कारण जानने के लिए शव का शव परीक्षण कराने की राय दी गयी। इस समय आत्महत्या के दुष्प्रेरण का कोई जिक्र नहीं हुआ।

(ञ) शिकायतकर्ता (पिड़ित के पिता) ने इसके उपरान्त अपने मूल निवास स्थान के थाना महुली पर 15.03.2021 को 02.08 बजे, आवेदक व सह अभियुक्त के विरूद्ध एक प्रथम सूचना रिपोर्ट पंजीकृत करायी, जिसका विस्तृत उल्लेख इस आदेश के प्रस्तर 2 में किया गया है।

(ट) प्रथम सूचना रिपोर्ट मे जिस आत्महत्या पत्र (सुसाइड नोट) का जिक्र किया है और जो अभियोजन ने 16.03.2021 को मृतक के कमरे से बरामद भी किया है, उसकी प्रति लिपि आवेदन के, अनुलग्नक सं० 11 के रूप में संलग्न है, जिसको संदर्भ के लिए निम्न पुनरूत्पादित किया जा रहा हैः-

"मै रघुवीर गुप्ता पुत्र राम बचन गुप्ता आज आत्म हत्या कर रहा हूँ। क्योंकि संत कबीर नगर के नगर पंचायत हरिहरपुर के पूर्व चेयरमैन पप्पू शाही एवं वर्तमान चेयरमैन द्वारा मुझे बेवजह फंसाया गया और जिसमें तत्कालीन पुलिस विभाग के उच्चाधिकारियों ने पूर्ण समर्थन किया। क्योंकि हम सभी अपने जमीनों के लिए लड़ रहे थे। लेकिन कुछ दिनों बाद यह भी पता चला कि 12 नवम्बर 2020 धनतेरस के दिन जिस दिन मै ड्यूटी पर था उस दिन भी मेरे ऊपर एफ०आई०आर० दर्ज कर लिये। इन्हीं सभी चीजो की वजह से मै अत्यन्त ही मानसिक तनाव से जुझ रहा हूँ और आज अपने आपको इस जिन्दगी से मुक्त करता हूँ।

क्योंकि न तो अब मुझे बेहतर जिन्दगी और न ही मै किसी से मुंह लगाने के काबिल रहा मैंने कई बार नाम हटवाने के लिए सिफारिश किया और आत्म समर्पण भी किया लेकिन कोई भी नतीजा नहीं आया।

अतः मै इस जिल्लत भरी जिन्दगी से अपने आपको मुक्त करने जा रहा हूँ।

मै अपने इस जीवन काल में जब एक बुजुर्ग माँ बाप के औलाद का सहारा मिलना चाहिए। उस वक्त मै उन्हें बेसहारा छोड़कर जा रहा हूँ एक जवान बहन जिसे भाई से कुछ उम्मीदे रहती है वह मै पूरा नहीं कर सका।

इसका मुझे अफसोस रहेगा लेकिन मै मानसिक रूप से अत्यन्त ही पीड़ित हूँ और मै इस जालिम दुनिया का सफर और नहीं तय कर सकता इसलिए मै इस दुनिया को अलविदा कहना चाहता हूँ।

मेरे रिश्तेदारो एवं परिवार वाले हर एक ने मेरा बखूबी साथ दिया इसलिए मै आप

सभी से माफी चाहता हूँ क्योंकि मैं आप में से किसी के भी उम्मीद पर खरा नहीं उतर सका।"

(ठ) आवेदक ने प्रथम पूरक शपथ पत्र के माध्यम से सह अभियुक्त जितेन्द्र कन्नोजिया को इस न्यायालय द्वारा दी गयी अंतरिम अग्रिम जमानत आदेश दिनांक 8.4.2021 (आपराधिक विविध अग्रिम जमानत याचिका धारा 438 दं०प्र०सं० के अंतर्गत सं-8507/2021)की प्रति पत्रावली पर प्रस्तुत करी है। जो आदेश दिनॉक 6.5.2021 के द्वारा अगामी तिथि तक बढ़ा दी गयी है।

(ड) आवेदक/अभियुक्त जो 16.03.2021 से न्यायिक अभिरक्षा में जिला करागार बस्ती में निरूद्ध है, ने एक जमानत प्रार्थना पत्र सं० 334/2021 सत्र न्यायालय, संत कबीर नगर, के समक्ष प्रस्तुत किया, परन्तु वो एक सकारण व विस्तृत आदेश दिनांक 05.04.2021 द्वारा निरस्त कर दिया गया, जिसके उपरान्त वर्तमान प्रार्थना पत्र, इस न्यायालय के समक्ष दाखिल किया गया है।

(ढ़) पत्रावली पर आवेदक ने जमानत प्रार्थना पत्र व द्वितीय पूरक शपथ पत्र के माध्यम से अपना 6 अन्य आपराधिक मुकदमों का आपराधिक इतिहास की घोषणा की है, जिसका विवरण व वर्तमान स्थिति निम्न उल्लेखित हैः-

(i) मुकदमा अपराध संख्या 440/2004, अंतर्गत धारा 147,148, 149, 452,323,506 भा०दं०सं० थाना महुली, जिला बस्ती (अब संत कबीर नगर) जिसमें अन्वेषण अधिकारी ने 5.12.2004 को अंतिम रिपोर्ट संख्या 21/04 सक्षम न्यायालय में प्रस्तुत की जा चुकी है।

(ii) मुकदमा अपराध संख्या 799/2006 अंतर्गत धारा 147,148,149,307,323, 327,395,435,436,440 भा०दं०सं०, थाना महुली, जिला संत कबीर नगर, जिसमें सक्षम न्यायालय द्वारा इस अन्वेषण अधिकारी द्वारा प्रेषित अन्तिम रिपोर्ट को आदेश दिनांक 12.06.2007 द्वारा स्वीकार किया जा चुका है।

(iii) मुकदमा अपराध संख्या 303/2012 अंतर्गत धारा 323,342,504,302 भा०दं०सं० व 3(2)5 अनुसुचित जाति/ अनुसुचित जनजाति अधिनियम थाना महुली, जिला संत कबीर नगर। जिसमें अन्तिम रिपोर्ट प्रेषित करने के बाद, प्रतिवाद याचिका दाखिल की गयी जिसको परिवाद के रूप में परिवर्तित कर लिया गया और आवेदक को सम्मन का आदेश दिनांक 16.07.2016 को पारित किया गया, जिसको आवेदक ने इस न्यायालय में चुनौती दी है, जिस पर अग्रिम कार्यवाही पर रोक लगाने का आदेश पारित किया गया है।

(iv) मुकदमा अपराध संख्या 136/2018 अंतर्गत धारा 147,392,447,427,506 भा०दं०सं०, थाना महुली , जिला संत कबीर नगर। जिसमें अन्वेषण उपरान्त अंतिम रिपोर्ट दाखिल की गयी, जिसको सक्षम मजिस्ट्रेट ने आदेश दिनांक 03.07.2019 द्वारा स्वीकार कर लिया है।

(v) मुकदमा अपराध संख्या 153/2020, अंतर्गत धारा 304ए भा०दं०सं०, थाना महुली, जिला संत कबीर नगर। जिसमें अन्वेषण के

उपरान्त अंतिम रिपोर्ट दाखिल करी गयी है ,जिस पर अभी कोई आदेश पारित नहीं हुआ है।

(vi) मुकदमा अपराध संख्या 64/2021, अंतर्गत धारा 147,269,506 भा०दं०सं०, दिनांक 25.02.2021 थाना महुली, जिला संत कबीर नगर। जिसमें आवेदक के अनुसार वर्तमान में अन्वेषण प्रगतिशील है।

<u>आवेदक का पक्ष</u>

4. न्यायालय के समक्ष आवेदक का पक्ष उसके विद्वान अधिवक्ता अनूप त्रिवेदी, वरिष्ठ अधिवक्ता ने अपने सहयोगी अधिवक्तागण राकेश कुमार श्रीवास्तव व मिथलेश कुमार तिवारी के साथ प्रस्तुत किया। जिसका सार निम्न है-

(i) आवेदक एक शान्तिप्रिय व विधि को मानने वाला एक जिम्मेदार नागरिक है, जो लोगों की सेवा वर्तमान में सभासद व पूर्व में अध्यक्ष, पंचायत के रूप में करता रहा है और करना चाहता है, उसका इस घटना से कोई सम्बन्ध नहीं है और उसके आपराधिक इतिहास से विदित है कि पूर्व मे भी उसके विरूद्ध झूठे आपराधिक मुकदमें पंजीकृत करे गये थे जो अन्वेषण के दौरान झूठे पाये गये। वर्तमान आपराधिक प्रकरण, आवेदक को मात्र अपमानित करने व उसकी सामाजिक प्रतिष्ठा को ठेस पहुचाने के उद्देश्य से पंजीकृत कराया गया है।

(ii) सार्वजनिक भूमि पर गांव वासियों (जिसमें शिकायतकर्ता भी एक था) के कृषि पट्टे न्याायिक प्रक्रिया के द्वारा विधिनुसार, जिला अधिकारी द्वारा उभय पक्ष को सुनकर, सकारण आदेश द्वारा निरस्त किये गये थे। उस आदेश में आवेदक की न तो कोई भूमिका और न ही कोई दुर्भावना ही थी। उसको इस आदेश का कोई लाभ भी नहीं था। पिड़ित, शिकायतकर्ता व ग्रामवासियो केवल संदेह के आधार पर उक्त आदेश की सारी जिम्मेदारी आवेदक व सह अभियुक्त पर डाल रहे हैं जो अनुचित है। आवेदक ने कभी भी स्थानीय प्रशासन पर उक्त आदेश हेतु कोई भी दवाब नहीं बनाया था। उक्त आदेश को न्यायिक प्रक्रिया के अंतर्गत चुनौती भी दी जा सकती है, परन्तु जानकारी के अनुसार अभी तक ऐसा नहीं किया गया है।

(iii) आत्महत्या से पूर्व लिखा गया कथित आत्महत्या पत्र (सुसाईड नोट) में आवेदक व सहअभियुक्त के ऊपर लगाये गये, मृतक को परेशान करने के सभी आरोप पूर्ण रूप से निराधार है और मात्र इस कारण से आत्महत्या के दुषप्रेरण का आरोप प्रथमदृष्टया भी नहीं बनता है। आवेदक ने न तो कोई अत्युक्ति कारित करी है और न ही उसकी कोई आपराधिक मनोवृत्ति ही प्रकट होती है, जो इस अपराध के आधारभूत अवयव है। यह भी महत्वपूर्ण है कि इस आत्महत्या पत्र का उल्लेख शिकायतकर्ता नें प्रथम सूचना रिपोर्ट जो 15.03.2021 को पंजीकृत कराई थी में कर दिया था कि वो पत्र पुलिस थाने में जमा है, परन्तु अन्वेषण अधिकारी ने कथित आत्महत्या पत्र को 16.03.2021 को मृतक के कमरे से बरामद किया जैसा कि सामान्य दैनिक

विवरण में उल्लेखित है। यह परिस्थितियां उक्त आत्महत्या पत्र को ही संदिग्ध बनाती है। अपने इन तर्को के समर्थन में, वरिष्ठ अधिवक्ता ने उच्चतम न्यायालय द्वारा अरनर्व मनोरंजन गोस्वामी बनाम महाराष्ट्र राज्य (2021) 2 एस०सी०सी०427, गुरचरन सिंह बनाम पंजाब राज्य (2000) 10 एस०सी०सी० 200 व पश्चिम बंगाल राज्य बनाम इन्द्रजीत कुन्दु व अन्य (2019) 10एस०सी०सी०128 के मामलों में पारित निर्णयों पर इस न्यायालय का ध्यान आकर्षित करवाया।

(iv) अभियोजन द्वारा अन्वेषण के उपरान्त आवेदक व सहअभियुक्त के विरूद्ध आरोप पत्र सक्षम न्यायालय में प्रेषित किया जा चुका है, अतः अब आवेदक को न्यायिक अभिरक्षा में कारागार में रखने का कोई न्याय संगत औचित्य नहीं है। आवेदक समाज का प्रतिष्ठित व्यक्ति है, जो न्याय प्रणाली का सम्मान करता है व उसके न्यायिक प्रक्रिया से भागने की कोई भी सम्भावना नहीं है, साथ ही साथ यह भी ध्यान रखने वाल तथ्य है कि धारा 306 भा०दं०सं० के अंतर्गत दोषी होने पर अधिकतम 10 वर्ष की सजा का प्रावधान है और वर्तमान में कोविड-19 महामारी के कारण और कारागार में क्षमता से अधिक अभियुक्त बन्द होने के कारण, इस महामारी के संक्रमण को रोकने के लिए परीक्षणाधीन अभियुक्तों की कुछ श्रेणियों को पेरोल भी न्यायिक आदेश से दिया जा रहा है।

(v) अभियोजन द्वारा जो श्रव्य अंश, जिसका विस्तृत उल्लेख सत्र न्यायालय ने अपने आदेश में किया है, उसकी कोई वैज्ञानिक जाँच नहीं हुई है, अतः यह नहीं माना जा सकता कि वो वार्ता कथित रूप से मृतक व आवेदक के मध्य ही हुई थी। इसके अतरिक्त वार्ता से भी यह साक्ष्य साबित नहीं होता है, कि आवेदक ने आत्महत्या के दुष्प्रेरण का अपराध कारित किया हो, क्योंकि वार्ता से न तो आवेदक की कोई आपराधिक मनोवृत्ति ही प्रकट होती है और न ही अपराध के लिए आवेदक के द्वारा कोई अत्युक्ति ही कारित होती प्रतीत होती है।

(vi) आवेदक जमानत मिलने की दशा मे किसी भी शर्त का उल्लंघन नहीं करेगा व न ही न्यायिक प्रक्रिया में किसी भी तरह की व्यवधान डालने की कोशिश करेगा। न्यायालय से प्रार्थना है कि आवेदक का जमानत प्रार्थना पत्र स्वीकार करें।

(Vii) आवेदक के पक्ष की ओर से लिखित बहस भी दाखिल की गयी जिसमें मुख्यता मौखिक बहस को ही लिखित रूप दिया गया है।

<u>अभियोजन व शिकायतकर्ता का पक्ष-</u>

5. आवेदक के पक्ष का विरोध में अभियोजन का पक्ष उसके विद्वान अधिवक्ता महेश चन्द्र चतुर्वेदी, वरिष्ठ अधिवक्ता व अतिरिक्त महाधिवक्ता नें अपने सहयोगी अजीत कुमार शर्मा व सतेन्द्र नाथ तिवारी, अतिरिक्त शासकिय अधिवक्ताओं के साथ तथा शिकायतकर्ता की ओर से उसके विद्वान अधिवक्ता बृजराज सिंह, ने रखा। जो संक्षेप मे निम्न हैः-

(i) आत्महत्या पत्र (सुसाइड नोट) व आवेदक व मृतक के मध्य हुई वार्ताओं के श्रव्य

अंश के आधार पर यह शीशे की तरह स्पष्ट है कि, आवेदक मृतक को परेशान कर रहा था। मृतक के द्वारा क्षमायाचना माँगने के बाद भी वो एक माफिया की तरह एक मजलूम पर जुल्म ठाये जाने वाले लहजे में बात करता सुनाई देता है। आत्महत्या पत्र में भी आवेदक व सह अभियुक्त द्वारा स्पष्ट रूप से आत्महत्या के दुष्प्रेरण का अपराध पूर्ण रूप से कारित किया जाना प्रथम दृष्टवा प्रकट होता है। इस नाते अधिवक्ताओं ने न्यायालय का ध्यान सत्र न्यायालय के आदेश के आंतरिक पृष्ठ सं० 5, 6 व 7 पर करवाया व उसको न्यायालय के समक्ष पढ़ा भी गया।

(ii) शिकायतकर्ता के अधिवक्ता ने निवेदन किया कि आवेदक एक आपराधिक मानसिकता रखने वाला अपराधी है, जिसका एक वृहत आपराधिक इतिहास भी है और उसका पुलिस व प्रशासनिक विभागों पर प्रभाव भी है, जिसके कारण उसके विरूद्ध आरोप पत्र प्रेषित न कर आपराधिक मामलों में अंतिम रिपोर्ट दाखिल की जाती रही है। इस कारण अगर आवेदक को जमानत दी जाती है तो इसकी संभावना अधिक होगी कि वो न्यायिक प्रक्रिया में अड़चन डाले व गवाहों को डरा धमका कर विचारण की प्रक्रिया को प्रभावित करे।

(iii) शिकायतकर्ता के अधिवक्ता ने यह भी कथन किया कि आवेदक व सह अभियुक्त ने मृतक व उसके पिता व ग्राम वासियों को परेशान करने के लिए उस पर झूठे आपराधिक मुकदमें पंजीकृत कराये व अपने प्रभाव से उन मुकदमों में अतिशीघ्र अन्वेषण पूर्ण कराके सबके विरूद्ध आरोप पत्र दाखिल भी करवा दिया। इसके विपरीत वर्तमान प्रकरण में अन्वेषण को रूकवाया व बहुत देर से पूर्ण होने दिया और बहुत मुश्किल उनके विरूद्ध आरोप पत्र दाखिल हो पाया है। इन सबसे यह स्पष्ट है कि आवेदक बहुत रसूख वाला व्यक्ति है, जिसका पुलिस व अन्य विभाग पर अच्छा खासा प्रभाव है। प्रकरण के गवाहान को उचित सुरक्षा भी प्रदान करायी जाये, जैसा कि सत्र न्यायालय ने आदेशित किया है।

(iv) सह अभियुक्त को अभी मात्र अंतरिम अग्रिम जमानत का आदेश दिया गया है तथा उसकी याचिका पर अभी अंतिम निर्णय पारित होना शेष है, इसके अतिरिक्त समता जमानत देने का एक मात्र आधार नहीं हो सकता है।

(v) शिकायतकर्ता ने अपने संक्षिप्त लिखित नोट के माध्यम से यह तथ्य इस न्यायालय के संज्ञान में लाया गया कि आवेदक ने अपना संपूर्ण आपराधिक इतिहास इस न्यायालय के समक्ष घोषित नहीं किया है। आवेदक अपराध मुकदमा संख्या 510/2017 अंतर्गत धारा 147,148,504,506,427 भा०दं०सं० व धारा 3(1)(xiv) अनुसुचित जाति/ अनुसुचित जनजाति (नृशंसता निवारण) अधिनियम 1989, दिनॉक 28/6/2017 थाना महुली, जिला- संत कबीर नगर में भी एक अपराधी है तथा सक्षम न्यायालय के समक्ष सम्मन तलब होने के उपरान्त भी उपस्थित नहीं हो रहा है, तथा वर्तमान में उसके विरूद्ध बी डब्लू जारी हो चुका है।

(vi) अतिरिक्त महा अधिवक्ता ने उपरोक्त बहस के अतिरिक्त एक और विषय पर

इस न्यायालय का ध्यान आकर्षित करवाया कि सत्र न्यायालय ने आवेदक की जमानत प्रार्थना पत्र निरस्त करते हुए जिले की कानून व्यवस्था व जिला के जिलाधिकारी व पुलिस अधीक्षक पर टिप्पणी की है, जो अनुचित व अकारण है। यह टिप्पणी आदेश के आंतरिक पृष्ठ 8 पर उल्लेखित है जो निम्न उल्लेखित हैः-

"आवेदक/अभियुक्तगण द्वारा वादी मुकदमा रामवचन गुप्ता तथा जगदीशपुर गौरा गाँव के अन्य लोगों से आवेदक/अभियुक्त रवीन्द्र प्रताप उर्फ पुप्पू शाही के बीच जमीन संबंधी विवाद चल रहा है जिसके कारण वादी मुकदमा का लड़का रघुबीर गुप्ता (मृतक) गाँव वालों के साथ जिला व तहसील पर प्रदर्शन करने के कारण अभियुक्त अपने साथियों के साथ रघुवीर गुप्ता को मानसिक रूप से प्रताड़ित करता था जिसका उल्लेख मृतक द्वारा अपने सुसाइड नोट में किया गया है और जो आडियो क्लीप न्यायालय के समक्ष प्रस्तुत की गयी है उससे भी स्पष्ट हो जाता है। ***यदि मृतक रघुबीर गुप्ता को जिला सन्त कबीर नगर के प्रशासन व उच्च अधिकारियों द्वारा अथवा पुलिस प्रशासन के उच्च अधिकारियों द्वारा उसके प्रार्थना पत्र पर व उसके याचना पर समय रहते नियमानुसार कार्यवाही की गयी होती तो मृतक रघुबीर गुप्ता अपना जीवन समाप्त नहीं करता। ऐसा प्रतीत होता है कि जनपद सन्तकबीर नगर में ला एण्ड आर्डर का अभाव है। यह बहुत ही दुख का विषय है। चूँकि अभियुक्त रवीन्द्र प्रताप उर्फ पप्पू शाही द्वारा जमीन के कब्जेदारी के विवाद को लेकर वादी मुकदमा के लड़के रघुबीर गुप्ता को मानसिक रूप से प्रताड़ित किया गया तथा मोबाईल फोन से प्रताड़ित किया गया और जिलाधिकारी व पुलिस अधीक्षक सन्तकबीर नगर को मृतक द्वारा प्रार्थना- पत्र दिये जाने पर उनके द्वारा कोई कार्यवाही नहीं की गयी, इस कारण वादी मुकदमा के लड़के रघुबीर गुप्ता ने आत्महत्या कर अपना जीवन समाप्त कर लिया गया। प्रशासन व पुलिस विभाग के जिन अधिकारियों द्वारा उसकी याचना पर कार्यवाही नहीं की गयी, उक्त अधिकारीगण भी परोक्ष रूप से उत्तरदायी प्रतीत होते हैं।" (रेखांकन न्यायालय द्वारा किया गया है)***

(vii) अतिरिक्त महाधिवक्ता ने निवेदन किया कि उपरोक्त टिप्पणी, जिलाधिकारी व पुलिस अधीक्षक के पक्ष को सुनवाई का अवसर न देते हुए की गई है और वो प्रकरण के तथ्यों के विपरीत भी है, पुलिस विभाग ने वर्तमान मामले में अतिशीघ्र अन्वेषण पूर्ण करा कर आवेदक व सह अभियुक्त के विरूद्ध आरोप पत्र प्रेषित भी करा जा चुका है। अतः इस अनुचित टिप्पणी को अपलोपित करने का आदेश पारित करे।

(viii) राज्य के पक्ष की ओर से लिखित बहस भी दाखिल की गई है जिसमें मौखिक बहस को लिखित रूप ही दिया गया है। शिकायतकर्ता ने भी एक लिखित नोट 31.05.25021 को दाखिल किया, जिसको भी न्यायालय ने ध्यान पूर्वक अवलोकन किया।

<u>जमानत की विधि</u>

6 (i) विधि का सिद्धान्त है कि "जमानत नियम और जेल अपवाद है"। जमानत न तो किसी यांत्रिक आदेश से स्वीकार या अस्वीकार ही की जा सकती है, क्योंकि यह न केवल उस व्यक्ति की स्वतंत्रता से संबंधित है, जिसके विरुद्ध आपराधिक कार्यवाही चल रही है, परन्तु यह दण्ड न्याय प्रणाली के हित से भी संबंधित है और यह भी सुनिश्चित करना आवश्यक है, कि अपराध करने वालों को न्याय में बाधा डालने का अवसर न दिया जाये।

(ii) जमानत के लिए आवेदन पर विचार करते समय, न्यायालय को कुछ कारकों को ध्यान में रखना चाहिए, जैसे कि अभियुक्त के खिलाफ प्रथम दृष्टया मामला का होना, आरोप की गंभीरता और प्रकृति, आरोप सिद्ध होने की स्थिति में सजा की कठोरता, अनुपूरक साक्ष्य की प्रकृति, न्यायालय की आरोप के लिये प्रथम दृष्टया संतुष्टि, अभियुक्त की हैसियत व पद, अभियुक्त की न्याय से भागने और अपराध को दोहराने की संभावना, साक्ष्य के साथ छेड़छाड़ की संभावना, शिकायतकर्ता और गवाह को धमकी की आशंका और अपराधी का अपराधिक इतिहास जमानत के लिए आवेदन पर विचार करते समय, न्यायालय को मामले के अभियोजन पक्ष के गवाहों की विश्वसनीयता व स्थिरता की स्थिति की गुण-दोष की जांच सघनता से नहीं करनी चाहिए। क्योंकि यह केवल परीक्षण के दौरान ही जांचा जा सकता है। इसके अतरिक्त समता ज़मानत का एकमात्र आधार तो नहीं है, परन्तु यह उपरोक्त पहलुओं में से एक हो सकता है, जो अनिवार्य रुप से जमानत के आवेदन पर विचार करते समय विचारणीय होने चाहिए।

(iii) यह अविवादित है, कि जमानत देना या न देना, यह उस न्यायालय का विवेकाधिकार है, जो इस मामले की सुनवाई कर रहा है। हालांकि यह विवेकाधिकार निर्बाध है। परन्तु इसका उपयोग न्यायसंगत, मानवीय व सहानुभूति पूर्वक ही किया जाना चाहिए न कि मनमाने तरीके से। जमानत स्वीकार या अस्वीकार करने के आदेश में कारणों को प्रथम दृष्टया इंगित करना चाहिए, हालांकि गुण-दोष पर साक्ष्य की विस्तृत जांच और विस्तृत दस्तावेजीकरण को दर्शाने की आवश्यकता नहीं है। जमानत की शर्तें इतनी भी सख्त नहीं होनी चाहिए की उसका अनुपालन करना ही अक्षम हो जाये, जिससे जमानत ही काल्पनिक न हो जाये।

<u>आत्म हत्या का दुष्प्रेरण की विधि-</u>

7(i) भा० दं० सं० की धारा 306, "आत्महत्या का दुष्प्रेरण" के अपराध व सजा के प्रावधानों को वर्णित करता है, जिसके अनुसार *" यदि कोई व्यक्ति आत्महत्या करे तो जो कोई ऐसी आत्महत्या का दुष्प्रेरण करेगा, वह दोनो मे से किसी भांति के कारावास से, जिसकी अवधि दस वर्ष तक हो सकेगी, दण्डित किया जाएगा और जुर्माने से भी दण्डनीय होगा"* तथा किसी बात का 'दुष्प्रेरण' क्या है यह भा०दं०सं० की धारा 107 में परिभाषित किया गया है, जिसके अनुसार दुष्प्रेरण का अपराध तीन रूप में कारित किया जा सकता है, पहला उस बात को करने के लिए किसी व्यक्ति को उकसाकर, दूसरा उस बात को करने के लिए षड्यन्त्र करके या अन्य व्यक्ति या व्यक्तियों के साथ सम्मलित होकर

षड्यन्त्र करके उसके अनुसरण या उद्देश्य से कोई कार्य या अवैध लोप घटित हो जाये अथवा तीसरा उस बात के किये जाने में किसी कार्य या अवैध लोप द्वारा साशय सहायता करना।

(ii) दुष्प्रेरण में एक मानसिक प्रक्रिया शामिल होती है, जिससे किसी व्यक्ति को उकसाने या अभिप्राय पूर्वक उसके किसी कार्य को सहायता देना होता है। आत्महत्या करने के लिए उकसाने या सहायता करने के लिए अभियुक्त की ओर से कोई सकारात्मक कार्य होना चाहिये तथा इन सबके पीछे अभियुक्त का दोषपूर्ण आशय अवश्य होना चाहिये।

(iii) दुष्प्रेरण के अपराध को सिद्ध करने के लिए उक्त अपराध को कारित करने के लिए अभियुक्त की आपराधिक दोषपूर्ण मानसिक स्थिति स्पष्ट रूप से दृष्टगोचर होनी चाहिए। आशय को सिद्ध करने के लिए, ऐसा साक्ष्य पत्रावली पर उपस्थित होना चाहिये कि अभियुक्त ने अपने दोषपूर्ण मानस के अनुसरण में किसी व्यक्ति को आत्महत्या के कृत को करने के लिए उकसाने या उसका उस कृत को कारित करने के लिए जान बूझकर सहायता प्रदान करी हो। (देखेः- **अरनव मनोरंजन गोस्वामी बनाम महाराष्ट्र राज्य व अन्यः (2021) 2 एस सी सी 427, कामन कॉज बनाम भारत सरकार (2018) 5 एस सी सी 1, राजेश बनाम हरियाणा राज्य (2020) 15 एस सी सी 359, गुरुचरन सिंह बनाम पंजाब राज्य (2020) 10 एस सी सी 200)**

<u>विश्लेषण</u>

8(i) पत्रावली पर उपलब्ध प्रपत्रों, उभय पक्ष की मौखिक व लिखित बहस से निम्न वो तथ्य है जिन पर प्रथम दृष्टवा कोई विवाद नहीं हो सकता हैः-

(a) मृतक रेलवे विभाग मे गेट मैन के पद पर कार्य करता था तथा मृत्यु के समय उसकी नियुक्ति, तकिया रेलवे स्टेशन पर थी व वो स्टेशन के पास सरकारी निवास पर रहता था तथा वही उसने जहर खाया व बाद में अस्पताल में उपचार के दौरान मृत्यु हो गयी।

(b) जिलाधिकारी ने कार्यवाही करते हुए सार्वजनिक भूमि पर कई वर्ष पूराने कृषि पट्टों को निरस्त कर दिया था, जिनसे मृतक के पिता (शिकायतकर्ता) व अन्य ग्रामवासी प्रभावित हुए थे व आदेश के विरूद्ध धरना प्रदर्शन भी हुआ था, जिसमें मृतक ने भी भागीदारी की थी।

(c) कथित रूप से सरकारी कार्य में अड़चन पहुँचाने के कारण व सहअभियुक्त पर हमला करने के कारण कुछ ग्रामवासियों के विरूद्ध प्रथम सूचना रिपोर्ट पंजीकृत हुई थी जिस पर अन्वेषण के बाद आरोप पत्र प्रेषित भी किये जा चुके है, जिनमे मृतक व शिकायतकर्ता भी शामिल है।

(d) आवेदक ने अपनी सुरक्षा के लिए पुलिस अधीक्षक के पास गुहार लगाई थी व कथित रूप से आवेदक व मृतक की कई वार्ता भी हुई थी जिसमें उसने क्षमा याचना करी थी। इसी क्रम में कथित रूप से मृतक व जिलाधिकारी की भी वार्ता हुई थी जिसमें मृतक ने अपनी परेशानियाँ साझा करी थी परन्तु उसकी प्रार्थना पर कोई कार्यवाही नहीं हुई थी।

(e) आवेदक वर्तमान में सभासद है तथा समाज में उसकी प्रतिष्ठा और प्रभाव भी है तथा उसका आपराधिक इतिहास भी है, जो वर्ष 2004 से अब तक 6 आपराधिक मुकदमों का है जिनमें या तो अंतिम रिपोर्ट प्रेषित की जा चुकी या न्यायालय के आदेश के कारण अगामी कार्यवाही पर रोक है। आवेदक ने एक आपराधिक मुकदमे की घोषणा नहीं करी है जिसका उल्लेख इस निर्णय में प्रस्तर 5(v) में किया गया है तथा ऐसा प्रतीत होता है कि उस मुकदमें में आवेदक के विरूद्ध बी० डब्लू० जारी किया गया है। न्यायालय के समक्ष समस्त जानकारी न देना एक गंभीर विषय है परन्तु वर्तमान प्रकरण में आवेदक ने अपने 6 आपराधिक मुकदमों की घोषणा की है, अतः एक अपराध का विवरण न देने की भूल दुर्भावनापूर्ण नहीं मानी जा सकती है।

(ii) अभियोजन का साक्ष्य प्रमुख्तयः आत्म हत्या पत्र व श्रव्य अंश पर आधारित है जिसमें आवेदक व सह अभियुक्त पर मृतक को परेशान करने का कथित साक्ष्य है तथा जिसके कारण मृतक ने आत्महत्या की थी, परन्तु जैसा पूर्व में उल्लेखित किया गया है कि आत्महत्या के दुष्प्रेरण के लिए अपराधी को दुष्प्रेरण का कृत किसी व्यक्ति को इस कृत का कारित करने के लिए उकसाने के लिए, आपराधिक मनोवृत्ति के साथ कि गयी कोई अत्युक्ति होनी चाहिये और इन कारणों की अनुपस्थिति की स्थिति में अपराध कारित होना नहीं माना जायेगा।

(iii) मृतक का आत्महत्या पत्र में यह लिखा गया है कि वो आवेदक व सहअभियुक्त द्वारा उसको आपराधिक मुकदमें मे कथित रूप से झूँठा फंसाने के कारण, मानसिक तनाव से ग्रस्त था। श्रव्य अंश में भी मृतक अपने आपको इस आपराधिक प्रकरण से मुक्त होने की याचना करता हुआ प्रतीत होता है। परन्तु आवेदक का लहजा सख्त रहता है तथा अभद्र भाषा का प्रयोग भी करता है। ऐसा प्रतीत होता है कि मृतक भूमि पट्टा के निरस्त होने के आदेश से ज्यादा अपने ऊपर लगाये गये आपराधिक मुकदमें से परेशान था जिसके कारण उसकी नौकरी पर प्रतिकूल प्रभाव पड़ सकता था। परन्तु वर्तमान स्तर पर यह नहीं कहा जा सकता है मृतक के ऊपर लगाया गया आपराधिक मुकदमा झूठा था जबकि उसकी मृत्यु से पहले ही उसमें आरोप पत्र भी दाखिल किया जा चुका था। मृतक ने अपने जीवन काल में उपरोक्त आपराधिक मुकदमों के निदान हेतु कोई भी विधिक प्रक्रिया का उपयोग नहीं किया गया था। इसके अतिरिक्त "समाधान दिवस" पर अशांति फैलाने व संज्ञेय अपराध कारित होने की आशंका को देखते हुए मृतक व अन्य के विरूद्ध धारा 151/107/114 दं०प्र०सं० के अंतर्गत की गयी कार्यवाही को भी प्रथमदृष्टवा दुर्भावना पूर्ण या आवेदक के प्रभाव के कारण किया जाना प्रतीत नहीं होता है।

(iv) जैसा पूर्व मे उल्लेखित किया गया है, दुष्प्रेरण का अर्थ उकसाना, प्रवृत्त करना, उत्तेजित करना, भड़काना या कोई कार्य करने के लिए बढ़ावा देना है और इन सबके पीछे अभियुक्त की आपराधिक मनोवृत्ति का होना भी अनिवार्य है तब ही आत्महत्या के दुष्प्रेरण का अपराध कारित होना माना जायेगा।

(v) वर्तमान प्रकरण में प्रथम दृष्टया पट्टा निरस्तीकरण की कार्यवाही विधि की उचित प्रक्रिया के अन्तर्गत हुई है, जिसके विरूद्ध पीड़ित व्यक्ति को उचित विधि प्रक्रिया के अंतर्गत उपचार भी प्रदान किया गया है। यहाँ यह भी स्पष्ट करना आवश्यक है कि आवेदक ने मृतक के विरूद्ध कोई भी शिकायत पुलिस के समक्ष नहीं करी है। जो भी आपराधिक मुकदमा मृतक के विरूद्ध पंजीकृत हुआ है, उसका शिकायतकर्ता सह अभियुक्त जितेन्द्र कन्नौजिया (जिसको इस न्यायालय ने अंतरिम अग्रिम जमानत दे रखी है) या विभाग के कर्मचारीगण हैं, केवल इस कारण से कि आवेदक का नाम आत्महत्या पत्र मे उल्लेखित है तथा कथित श्रव्य अंश में मृतक व आवेदक के बीच वार्ता में मृतक, याचना कर रहा है व आवेदक सख्त लहजे मे बोल रहा है, प्रथम दृष्टया यह नहीं माना जा सकता कि आवेदक के ऊपर लगाया गया आत्महत्या के दुष्प्रेरण का आरोप पूर्ण रूप से सत्य है, इसके प्रतिकूल प्रथमदृष्टया पूर्व के विश्लेषण के आधार पर तथा धारा 306 भा०द०सं० के अवयवों को ध्यान में रखा जाये तो प्रथम सूचना रिपोर्ट व उपलब्ध प्रपत्रों तथा धारा 306 के अवयवों के बीच संबंध स्थापित हुआ प्रतीत नहीं होता है, बल्कि इसके विपरित वियोजित प्रतीत होता है।

(vi) उपरोक्त विश्लेषण, जमानत की विधि में वर्णित अनिवार्य कारकों को और कोविड-19 के कारण उत्पन्न विषम परिस्थियों को भी ध्यान में रखते हुए, आवेदक, जो 16.03.2021 से कारावास में है, उसकी जमानत याचिका को स्वीकार करने का मजबूत पक्ष, इस न्यायालय के समक्ष प्रस्तुत करने में सफल हो पाया है।

9. "आफ द कफ" टिप्पणी

अतिरिक्त महाधिवक्ता ने इस न्यायालय का ध्यान, सत्र न्यायालय द्वारा आवेदक की जमानत प्रार्थना पत्र को निरस्त करते हुए संत कबीर नगर जिले की कानून व्यवस्था व जिले के जिलाधिकारी व पुलिस अधीक्षक पर की गयी टिप्पणी पर भी कराया है व प्रार्थना करी कि उस टिप्पणी को अपलोपित कर दिया जाये। यह न्यायालय आवेदक की जमानत याचिका पर जमानत के समवर्ती अधिकार क्षेत्र के अंतर्गत सुनवाई कर रहा है तथा उक्त आदेश न्यायालय के समक्ष आक्षेपित भी नही है, अतः यह न्यायालय वर्तमान क्षेत्राधिकार में इस प्रार्थना को स्वीकर नही कर सकता तथा उसके उपचार के लिए राज्य, उचित व विधि सम्मत निदान की प्रक्रिया अपनाने के लिए स्वतंत्र है, फिर भी यह कहना यथोचित रहेगा कि अवर न्यायालय को "आफ द कफ" (off the cuff) टिप्पणी देने से बचना चाहिये। ऐसी टिप्पणी जब तक अति आवश्यक न हो उल्लेखित करनी नहीं चाहिये, वो भी तब जब उस अधिकारी को अपने बचाव या परिस्थितियों के स्पष्ट करने का कोई मौका न दिया गया हो। यहाँ यह भी उल्लेखित करना भी प्रासंगिक रहेगा कि किसी भी जिला के जिलाधिकारी व पुलिस अधीक्षक या और भी अन्य अधिकारी को अपना कार्य निष्ठापूर्वक व संवेदनशील होकर करना चाहिये और किसी पीड़ित की व्यथा की सुनवाई व उचित कार्यवाही अति शीघ्र करने का भरकस प्रयास करना चाहिये। (देखें **भारत के मुख्य निर्वाचन आयुक्त**

बनाम एस० आर० विजया भाष्कर व अन्य (2021) एस०सी०सी ऑनलाइन एस०सी० 364)

10. त्वरित विचारण

अवर न्यायालय से यह अपेक्षा रहेगी कि वो वर्तमान प्रकरण का विचारण शीघ्रता से कर मामले का निपटारा करेगी तथा विचारण के दौरान दं०प्र०सं० की धारा 309 में कार्यवाही को मुल्तवी या स्थगित करने की शक्ति के प्रावधानों का ध्यान भी रखा जायेगा। त्वरित विचारण (स्पीडी ट्रायल) जिसका तात्पर्य "उचित शीघ्रता वाला विचारण है" भारतीय संविधान के अनुच्छेद 21 में प्रतिष्ठापित "प्राण व दैहिक स्वतंत्रता" के मूल अधिकार का अभिन्न एवं मूलभूत अंश है। अवर न्यायालय से अपेक्षा रहेगी की वर्तमान प्रकरण में विचारण आज से अधिकतम 6 मास के भीतर सम्पन्न कर लिया जायेगा। (देखेः **हुसैन आरा खातून (iv) बनाम गृह सचिव, बिहार राज्यः (1980) 1 एस सी सी 81, अब्दुल रहमान अंतुल्य बनाम आर० एस० नायकः (1992) 1एस सी सी 225, करतार सिंह बनाम पंजाव राज्यः (1994) 3 एस सी सी 569, कॉमन कॉज बनाम भारतीय संघः(1996) 4 एस सी सी 33)**

साक्षी सुरक्षा योजना

11. उच्चतम न्यायालय ने **महेन्द्र चावला व अन्य बनाम भारत संघ (2019) 14 एस० सी० सी० 615** के मामले में पारित निर्णय दिनॉक 5.12.2018, में केन्द्रिय सरकार के द्वारा राज्यों व अन्य प्रधिकरणों से विचार विमर्श के उपरान्त निर्मित "साक्षी सुरक्षा योजना 2018" (विटनेस प्रोटेक्शन स्कीम 2018) जो उक्त निर्णय में पूर्ण रूप से उल्लेखित की गयी है, को पूर्ण रूप में स्वीकार किया व, भारतीय संविधान के अनुच्छेद 141/142 के अंतर्गत उक्त योजना को एक विधि का दर्जा देते हुए, योजना को तत्काल प्रभाव से लागू करने का आदेश पारित किया। साथ ही साथ हर राज्य व केन्द्र शासित राज्य को इस योजना को विधि के रूप मे साक्षर पालन करने का निर्देश भी दिया जा चुका है। उक्त योजना के अंतर्गत सक्षम प्राधिकार को साक्षी को उचित सुरक्षा प्रदान करने के लिए आदेश पारित करने के अधिकार दिये गये है। अगर उत्तर प्रदेश राज्य ने अभी तक उक्त निर्णय का साक्षर अनुपालन नहीं किया गया है तो वो **महेन्द्र चावला (पूर्व में उल्लेखित)** के निर्णय के अनुपालन न करने के कारण हो सकने वाले कार्यवाही के लिए उत्तरदायी होंगे। शिकायतकर्ता अपनी व अन्य साक्षी की सुरक्षा के लिए राज्य या पुलिस अधीक्षक के समक्ष आवेदन देने के लिए स्वतंत्र है, जो विधिसम्मत निर्णय लेने के लिए वाध्य होंगें। इस योजना के परिच्छेद 12 के अनुसार प्रत्येक राज्य इस योजना का व्यापक प्रचार करने के लिए बाध्य हैं, अतः इसके लिये उत्तर प्रदेश राज्य ने अगर अभी तक उचित प्रक्रिया लागू नहीं करी है, तो अब अवश्य करें। राज्य के मुख्य सचिव पर इसके अनुपालन का उत्तरदायित्व है अतः वो अविलम्ब उचित अगामी कार्यवाही करे। इसी परिच्छेद के

अनुसार, अन्वेषण अधिकारी भी बाध्य है कि वो इस योजना व इसकी मुख्य विशेषताएँ साक्षियों को बतायें, अगर वर्तमान प्रकरण में ऐसा न किया गया हो, तो तुरंत किया जाये। वर्तमान प्रकरण में अगर किसी भी साक्षी को किसी प्रकार के खतरे की आशंका है तो उसको ध्यान में रखते हुए यह प्रशासन का उत्तरदायित्व है कि वो उनको उचित सुरक्षा प्रदान करे। इस संबध में उत्तर प्रदेश के पुलिस महानिदेशक को निर्देशित किया जाता है कि उक्त योजना की जानकारी अपने विभाग में प्रत्येक थाने तक पहुचाने के लिए योजनाबद्ध प्रयास करें तथा यह भी सुनिश्चित करें कि इस योजना का उचित लाभ साक्षियों को प्राप्त हो सके।

12. अतः उपरोक्त वर्णित विभिन्न पहलुओं पर विधि की स्थिति, प्रकरण के तथ्य व परिस्थितियों तथा उपरोक्त विश्लेषण को ध्यान में रखकर, यह न्यायालय इस निष्कर्ष पर पहुँचता है कि वर्तमान जमानत का प्रार्थना पत्र स्वीकार किये जाने योग्य है। अतः स्वीकार किया जाता है।

13. प्रार्थी/आवेदक, **रविन्द्र प्रताप शाही उर्फ पप्पू शाही** जो मु०अ०सं० 0085/2021 अन्तर्गत धारा 306 भा०दं०सं० थाना महुली, जिला सन्त कबीर नगर में अभियुक्त/आरोपित है, जो उसके द्वारा वो राशि जो सक्षम न्यायालय द्वारा निर्धारित की जायेगी के व्यक्तिगत बंधपत्र एवं उसी धनराशि की दो प्रतिभूति निष्पादित/प्रस्तुत करने पर अविलम्ब जमानत पर निम्न शर्तों के अधीन रिहा किया जावेः-

(i) प्रार्थी/आवेदक इस आशय का आवश्वासन देगा कि वह सक्षम न्यायालय के सम्मुख किसी भी प्रकार से न्यायालय की कार्यवाही को स्थगित नहीं करवाएगा तथा वह प्रत्यक्ष अथवा परोक्ष रूप में किसी भी प्रकार से गवाहान को प्रभावित नहीं करेगा तथा न्यायकरण की प्रक्रिया को अवरूध नहीं करेगा। यदि वह उपरोक्त व्यवस्था को नहीं मानेगा उस दशा में सक्षम न्यायालय प्रार्थी के जमानत आदेश पर समुचित कार्यवाही करने हेतु स्वतन्त्र होगा।

(ii) प्रार्थी/आवेदक सक्षम न्यायालय के सम्मुख प्रत्येक दशा में, जैसा कि आदेशित हो, प्रत्येक दिवस पर व्यक्तिगत रूप से अथवा अपने अविभाषक के माध्यम से उपस्थित होवेगा एवं यदि अनुपस्थिति बिना किसी समुचित आधार के पाई जावेगी उस दशा में सक्षम न्यायालय प्रार्थी/आवेदक के विरूद्ध धारा 229-अ भारतीय दण्ड संहिता के अन्तर्गत कार्यवाही के लिए स्वतन्त्र होगा।

(iii) यदि प्रार्थी/आवेदक जमानत की किसी भी स्थिति से परे कार्य करेगा एवं सक्षम न्यायालय के सम्मुख अनुपस्थित रहेगा उस दशा में सक्षम न्यायालय प्रार्थी/आवेदक के विरूद्ध धारा 82 दण्ड प्रक्रिया संहिता की कार्यवाही करने हेतु स्वतन्त्र रहेगा।

(iv) आवेदक, जब तक इस प्रकरण का विचारण संपूर्ण नहीं हो जाता है, वो

शिकायतकर्ता के मौहल्ला सूर्य, नगर पंचायत हरिहरपुर, थाना महोली, जिला संत कबीर नगर में प्रवेश नहीं करेगा और अति आवश्यक हो तो प्रवेश के पूर्व थाना प्रभारी महोली को पूर्व में लिखित में सूचना देगा तथा प्रवेश का कारण बतायेगा तथा सक्षम थाना प्रभारी प्रवेश की अनुमति देने या न देने का अधिकारी होगा।

(v) आवेदक/ प्रार्थी की ओर से इस जमानत आदेश की प्रतिलिपि इलाहाबाद उच्च न्यायालय की अधिकृत वेबसाइट से अधोभरण (डाउनलोड) कर के भी सक्षम न्यायालय के सम्मुख प्रस्तुत की जावेगी।

(vi) सक्षम न्यायालय/अधिकारी आदेश की कम्प्यूटर जनित(जनरेटेड) प्रतिलिपि का सम्यक परीक्षण इलाहाबाद उच्च न्यायालय की अधिकृत वेबसाइट से करने के उपरान्त ही लिखित रूप में आवेदक/प्रार्थी को जेल से छोड़ने का आदेश पारित करेगा।

14. उपरोक्त शर्तों का उल्लंघन करने की दशा में प्रार्थी/आवेदक की जमानत निरस्त की जा सकेगी।

15. इस आदेश में उल्लेखित कोई भी टिप्पणी विचारण की प्रक्रिया व आदेश को किसी भी तरह से प्रभावित नहीं करेगी।

16. वर्तमान जमानत याचिका उपरोक्त आदेशानुसार स्वीकर की जाती है।

17. इस उच्च न्यायालय के महाप्रबन्धक को निर्देशित किया जाता है कि वो इस निर्णय की एक प्रति अतिशीघ्र उत्तर प्रदेश शासन के मुख्य सचिव व पुलिस महानिदेशक को इस आशय से प्रेषित करे की इस निर्णय के प्रस्तर 11 में "साक्षी सुरक्षा योजना 2018" को राज्य में विधि के रूप में साक्षर, अनुपालन संबधी निदेशो को अतिशीघ्र कार्यान्वित करें।

18. उत्तर प्रदेश शासन के मुख्य सचिव व पुलिस महानिदेशक को यह भी निर्देश दिया जाता है कि इस निर्णय के प्रस्तर 11 में दिये गये निर्देशों के परिपालन संबंधी प्रगति रिपोर्ट, व्यक्तिगत शपथ पत्र के साथ इस न्यायालय के समक्ष आज से चार सप्ताह के भीतर दाखिल करें।

19. इस जमानत याचिका को इस निर्णय के केवल प्रस्तर 11, 17 व 18 में पारित निदेशों की प्रगति के अवलोकनार्थ व अगामी उचित आदेश के लिए 5/07/2021 को इस पीठ के समक्ष नवीन वाद सूची में क्रम संख्या एक पर सूचीबद्ध किया जाये।

(2021)06ILR A413
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 03.06.2021

BEFORE

THE HON'BLE JASPREET SINGH, J.

Civil Revision No. 101 of 2012

Anil Jaiswal ...Revisionist
Versus
Smt. Khalida Fazli ...Opp. Party

Counsel for the Revisionist:
N.N. Jaiswal, Deepak Seth, Prashant Jaiswal, Ratnesh Chandra, Ravindra Pratap Singh

Counsel for the Opp. Party:

S.W. Zaman, Awadhesh Kumar, Sanjay Kumar Srivastava

Suit for seeking arrears of rent and ejectment preferred by the Plaintiff been decreed-Revisionist tennant challenged the order-relationship of lessor and lessee not disputed-ter of lease as agreed has expired-notice terminating tenancy not disputed.

Revision dismissed.(E-8)

List of Cases cited:

1. M/s Kedarnath Baijnath & ors. Vs Sri Ram Chandra Ji, Sri Jankiji, Sri Lakshman Ji, Virajman Mandir & ors., 1991 ARC page 420

2. C.Albert Morris Vs K. Chandrasekaran & ors., 2006 (1) SCC 228

3. Santosh Kumari Anand Vs U.P. Power Corporation Vidyut Transmission Khand Thru. Exe. Engg. reported in 2012 (2) ARC 420

4. Smt. Mehroon Nisha Vs Allah Tala Waqf No. 232 Masjid Akhoon Zada Shahib, Bareilly,2009, ACJ, 183

5. Govardhan Goyal & ors. Vs Rishi Raj Singhal reported in 2013 (9) ADJ 138.

6. Trilok Singh Chauhan Vs Ram Lal & ors. reported in 2018 (2) SCC 566

7. State of Uttar Pradesh Vs Lalji Tandon, 2004 (1) SCC 1

8. Syed Jaleel Zane Vs P. Venkata Murlidhar AIR 1981 AP 328

9.A.H. Forbes Vs Hanuman Bhagat & ors.,AIR 1924 Patna 88

10. Society of State Vs Itwari, AIR 1937 Alld. 572

11. Savitri Devi & ors. Vs First Additional District and Sessions Judge reported in 1994 (24) ALR 181

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

1. The instant revision has been preferred under Section 25 of the Provincial Small Causes Court Act, 1887 against the judgment and order dated 03.09.2012 passed by the Additional District Judge, Court No. 1, Barabanki in SCC Suit No. 3 of 2007 by means of which the SCC Suit No. 3 of 2007 seeking arrears of rent and ejectment preferred by the plaintiff-respondents has been decreed and the defendant-revisionist has been directed to handover the possession of the property in question within three months to the plaintiff/landlord.

2. The revisionist-tenant has assailed the judgment dated 03.09.2012 primarily on two grounds.

(i) It has been urged by Sri Ratnesh Chandra, learned counsel for the revisionist that the lease which was granted was of a permanent nature and it was not open for the landlord/respondent to terminate the said tenancy. The lease being permanent was not capable of termination and this aspect of the matter has not been considered in the correct perspective and has been decided against the weight of the material on record.

(ii) The other submission of Sri Chandra is that the landlord had leased out an open piece of land. That being so in view of Section 15 of the Act of 1887 read with Article 4 as appended to the Second Schedule of the Provincial Small Causes Court Act, the suit was not maintainable before the Judge, Small Causes and the decree passed by the Court being wholly without jurisdiction is liable to be set aside.

3. Per contra, Sri Sanjay Kumar, learned counsel for the landlord/respondent

submits that the lease was though of an open piece of land but the covenants of the lease clearly provided that the tenant could only raise temporary constructions and upon termination of the lease or upon expiry of its term the tenant would have 3 month's time to remove the same, in case if he fails to do so, the said constructions would vest with the landlord and in such a case where the landlord seeks eviction from the land and building, hence, such a suit would be cognizable by the Judge, Small Causes.

4. It is further urged that the lease which was executed on 13.04.2000 comprised of both land and temporary construction and thus when the lease expired, even at the time of issue of notice and as also at the time of filing of the suit the eviction was sought from both land and building, hence, the suit was filed before Judge Small Cause and this has been adequately considered by the court below.

5. It has also been urged that the lease was not permanent and the submission to the contrary is misconceived, inasmuch as, the lease deed clearly indicated the term to be 5 years and upon the expiry of the aforesaid term, the tenant was required to vacate. There is no covenant nor there is any material to indicate either by intention or by any deed that the parties ever contemplated creating a perpetual lease. This aspect of the matter has also been considered by the Trial Court and has been negatived, consequently, only to harass the landlord, the instant revision has been preferred which deserves to be dismissed.

6. The learned counsel for the respondents has relied upon a decision of this Court in the case of ***(i) M/s Kedarnath Baijnath and Others Vs. Sri Ram Chandra Ji, Sri Jankiji, Sri Lakshman Ji, Virajman Mandir and Others*** reported ***1991 ARC page 420 (ii) C.Albert Morris Vs. K. Chandrasekaran and Others reported in 2006 (1) SCC 228, (iii) Santosh Kumari Anand Vs. U.P. Power Corporation Vidyut Transmission Khand Thru. Exe. Engg.*** reported in ***2012 (2) ARC 420, (iv) Smt. Mehroon Nisha Vs. Allah Tala Waqf No. 232 Masjid Akhoon Zada Shahib, Bareilly*** reported in ***2009, ACJ, 183 and (v) Govardhan Goyal and Others Vs. Rishi Raj Singhal reported in 2013 (9) ADJ 138..***

7. In order to appreciate the rival contentions, certain facts giving rise to the instant revision are being noticed first:-

8. That the landlord-respondent instituted a suit bearing SCC Suit No. 3 of 2007 before the Court of Civil Judge, Senior Division, Court No. 20, District Barabanki acting as Judge, Small Causes. In the plaint, it was specifically pleaded that the land bearing No. 805M, 645M, 646M situated in Gram Paisar, Pargana and Tehsil Nawabganj, District Barabanki was leased out to the father of the revisionist namely Bharion Prasad. The boundaries of the leased land was also mentioned in paragraph 1.

9. It was specifically pleaded that a lease deed was executed by the landlord in favour of Sri Bharion Prasad and Sri Anil Jaiswal on 13.04.2000. The said lease was for a period of 5 years. The lease provided that the lease would commence from the year 1997 and for the first 5 years, the rate of rent would be Rs. 4,000/-, in case if after the first 5 years, the lease is renewed then the rate of rent would be Rs. 5,000/- for the next 5 years. It was further pleaded that upon the expiry of the first five years, with

consent, the lease was extended on the existing terms except that the rate of rent stood enhanced to Rs. 5,000/-. Since Bharion Prasad, the father of the revisionist expired, hence, the revisionist alone succeeded to the lease hold rights. The said lease came an end on 31.12.2006. since the tenant had stopped paying the rent, hence, a notice determining the tenancy was issued on 30.11.2006 which was served on the revisionist and as the tenant did not comply or vacate the premises, hence, the suit was instituted.

10. The tenant-revisionist filed his written statement wherein he admitted the plaintiff-respondent to be the landlord. He also admitted the execution of the lease deed dated 13.04.2000. However, took the defence that the lease was of a permanent nature and the plaintiff-respondent did not have the right to evict the tenant-revisionist. In the additional plea, it was stated that the tenant had raised permanent constructions which was in the knowledge and with consent of the landlord. The defendant had spent more than Rs. 75 lakhs on the said constructions and the same continued since long.

11. It was also pleaded that initially the father of the respondent namely Chaudhary Mohd. Azimuddin Asharaf had executed a lease in favour of the father of the revisionist namely Bharion Prasad on 01.09.1967. In pursuance thereof, the father of the revisionist had raised constructions and erected sheds for the purposes of opening a Service Station and a workshop. Initially the rent was Rs. 160/- per month for the period of 10 years.

12. After the said lease expired in the month of September, 1977, Chaudhary Mohd. Azimuddin Asharaf instituted SCC Suit No. 22 of 1977 wherein a compromise was arrived at and in terms of the said compromise decree, the lease was extended till 01.09.1987 with an enhanced rate of Rs. 300/- per month. It was also pleaded that the father of the revisionist had not only established a service station but had also taken an agency for tractors and also raised 10 shops with slab and other permanent constructions and as the lease was renewed from time to time but on an enhanced rate of rent which was continued to be paid by the revisionist.

13. It was also pleaded that after the lease expired in the year 1987, the same was further extended for a period of 5 years on enhanced rate of rent of Rs. 1,000/- per month. After the death of Chaudhary Mohd. Azimuddin Asharaf, a fresh lease was executed on 13.04.2000 which was for a period of 5 years w.e.f. 1997. The rate of rent was again enhanced to Rs. 5,000/- for the first 5 years and Rs. 10,000/- for the next term and that the lease would continue till the time the constructions remained. These pleadings related to the plea regarding the lease being of permanent nature.

14. Another defence taken by the revisionist in paragraph 29 of the written statement was that the Court did not have the jurisdiction to try the suit.

15. The parties led the evidence and the SCC Court after considering the material evidence as well as the submissions of the learned counsel for the parties while writing its judgment framed 5 points for determination to effectively answer the controversy.

16. The SCC Court first dealt with the point of jurisdiction and found that in terms

of Clause 11 of the lease deed which provided that in case if the tenant did not remove the said constructions within three months, the same would vest with the landlord and as the said condition was breached and the eviction was from the building, hence, the suit was cognizable by the Judge, Small Causes. The court below also relied upon a decision of this Court in the case of ***M/s Kedar Nath Baijnath (Supra).***

17. While considering the plea of permanent lease, the SCC Court found that the lease was for a fixed term with no option of renewal or extension, hence, it decided the same against the tenant. It further found that since the relationship of the landlord and tenant was admitted and also the rate of rent as well as the fact that the term of the lease stood expired and the notice was duly served, hence, the suit was decreed by means of judgment and decree dated 03.09.2012.

18. It is in the aforesaid backdrop that the said judgment has been assailed on the twin issues as raised by the learned counsel for the revisionist.

19. The Court has heard the learned counsel for the parties and also perused the record.

20. At the outset it will be apposite to notice that this Court is exercising revisional powers under Section 25 of the Provincial Small Cause Court Act.

21. The power under Section 25 of the Provincial Small Cause Court Act though is wider than Section 115 C.P.C. but the very nature of the revisional power is that it is truncated. The Apex Court in the case of ***Trilok Singh Chauhan Vs. Ram Lal and Others*** reported in ***2018 (2) SCC 566*** had the occasion to consider the scope of the revisional powers under Section 25 of the Provincial Small Cause Court Act and by relying upon an earlier decision of the Apex Court in the case of Hari Shanker Vs. Rao Girdhari Lal Chaudhary reported in AIR 1963 SC 698 and a subsequent decision of Mundrilal Vs. Sushila Rani reported in 2007 (8) SCC 609, in paragraphs 15 and 16 has held as under:-

15. *The scope of Section 25 of the 1887 Act, came for consideration before this Court on several occasions. In Hari Shankar v. Rao Girdhari Lal Chowdhury [Hari Shankar v. Rao Girdhari Lal Chowdhury, AIR 1963 SC 698] , in paras 9 and 10, this Court laid down the following: (AIR p. 701)*

"9. The section we are dealing with, is almost the same as Section 25 of the Provincial Small Cause Courts Act. That section has been considered by the High Courts in numerous cases and diverse interpretations have been given. The powers that it is said to confer would make a broad spectrum commencing, at one end, with the view that only substantial errors of law can be corrected under it, and ending, at the other, with a power of interference a little better than what an appeal gives. It is useless to discuss those cases in some of which the observations were probably made under compulsion of certain unusual facts. It is sufficient to say that we consider that the most accurate exposition of the meaning of such sections is that of Beaumont, C.J. (as he then was) in Bell & Co. Ltd. v. Waman Hemraj [Bell & Co. Ltd. v. Waman Hemraj, 1937 SCC OnLine Bom 99 : (1938) 40 Bom LR 125 : AIR 1938 Bom 223] , where the learned Chief Justice, dealing with Section 25 of the Provincial Small Cause Courts Act, observed: (SCC OnLine Bom paras 3-4)

"3. ... The object of Section 25 is to enable the High Court to see that there has been no miscarriage of justice, that the decision was given according to law.

4. The section does not enumerate the cases in which the Court may interfere in revision, as does, Section 115 of the Code of Civil Procedure, and I certainly do not propose to attempt an exhaustive definition of the circumstances which may justify such interference; but instances which readily occur to the mind are cases in which the Court which made the order had no jurisdiction, or in which the Court has based its decision on evidence which should not have been admitted, or cases where the unsuccessful party has not been given a proper opportunity of being heard, or the burden of proof has been placed on the wrong shoulders. Wherever the Court comes to the conclusion that the unsuccessful party has not had a proper trial according to law, then the Court can interfere. But, in my opinion, the Court ought not to interfere merely because it thinks that possibly the Judge who heard the case may have arrived at a conclusion which the High Court would not have arrived at.'

This observation has our full concurrence.

10. What the learned Chief Justice has said applies to Section 35 of the Act, with which we are concerned. Judged from this point of view, the learned Single Judge was not justified in interfering with a plain finding of fact and more so, because he himself proceeded on a wrong assumption."

16. Another judgment which needs to be noted is judgment of this Court in Mundri Lal v. Sushila Rani [Mundri Lal v. Sushila Rani, (2007) 8 SCC 609] . This Court held that jurisdiction under Section 25 of the 1887 Act, is wider than the revisional jurisdiction under Section 115 CPC. But pure finding of fact based on appreciation of evidence may not be interfered with, in exercise of jurisdiction under Section 25 of the 1887 Act. The Court also explained the circumstances under which, findings can be interfered with in exercise of jurisdiction under Section 25. There are very limited grounds on which there can be interference in exercise of jurisdiction under Section 25; they are, when (i) findings are perverse or (ii) based on no material or (iii) findings have been arrived at upon taking into consideration the inadmissible evidence or (iv) findings have been arrived at without consideration of relevant evidence.

22. Now in the aforesaid backdrop, the Court shall examine the submissions of the learned counsel for the parties. In order to finally determine the two submissions, it will be necessary to notice the relevant clauses of the lease deed.

23. The lease was executed on 13.04.2000. A term of 5 years was specifically provided in the deed and the tenant was permitted to raise temporary structure according to the plan annexed with the said lease and the specifications attached with it.

24. The lease specifically provided that the tenant shall not raise any permanent structures. The lease rent was agreed at Rs. 4,000/ per month for a period of 5 years from 01.01.1997.

25. Clause 2 of the said lease provided that upon the commencement of the lease, the lessee with all possible expedition raise suitable temporary structure in confirmity with the map and plan annexed so that the same is completed within a period of 6 months. **It further**

provided that such constructions shall remain the property of the tenant during the term of the tenancy but immediately on expiry of such term or its sooner determination the tenant shall remove the same from the said land otherwise the same shall become the absolute property of the landlord who shall be entitled to enter upon and to take possession of the same.

26. In Clause 6 of the lease deed it was specifically provided that the tenant shall carry on his business but shall not make any construction of permanent nature.

27. Clause 11 of the lease deed provided that the tenant shall have the option to extend the lease of the said **land and structure** erected thereon for a further period of 5 years on the expiry of the lease period provided the lessee gives a notice in writing by registered post to the lessor of his intention to do so at least 3 calender months before the termination of the present lease provided that such notice shall be accompanied with a deposit of Rs. 5,000/- as security for regular payment of rent during the extended term. It further provided that the lease rent for the extended term would be Rs. 5,000/- and after the expiry of the said fixed term of 5 years, the lessor shall **not** be entitled to exercise a further option of renewal of the tenancy and shall hand over and **deliver the land and structure (if not removed within three months) to the landlord/lessor in good condition as hereinbefore provided.**

28. Clause 18 of the lease deed further provided that the lessee within 30 days before expiry of the period of this lease will intimate the lessor of his intention in writing to continue for a fresh term on the terms and conditions setforth by the lessor and the lessee to be finalized before the term of 5 years expiring on 31.12.2006 and no payment of rent will be withheld beyond a period of 90 days failing which the lessor shall be entitled to claim the interest at the rate of 18% per annum on the amount so withheld.

29. Clause 19 of the lease deed further provided that if the lessee continues even after the expiry of 10 years as mentioned above, the lessor will be entitled to claim the rent of Rs. 10,000/- per month and the second party i.e. the lessee would have no objection to pay the enhanced rent.

30. In the aforesaid backdrop, considering the covenants contained in the lease deed as well as the defence raised by the revisionist, it is to be ascertained whether the parties intended to create a permanent lease.

31. At this juncture, it will be relevant to notice that in India a lease may be in perpetuity as neither the Transfer of Property Act, 1882 nor the general law prohibits a lease in perpetuity. However, there are certain conditions as well as principles which have to be noticed in order to arrive at a conclusion whether a lease in question is in perpetuity. It will be also relevant to notice the difference between an extension of a lease as well as its renewal and what implications does it entail.

32. The Apex Court in the case of ***State of Uttar Pradesh Vs. Lalji Tandon*** reported in ***2004 (1) SCC 1*** had the occasion to consider the aforesaid aspect of the matter wherein it quoted with approval the proposition laid down by a Division Bench of the Andhra Pradesh High Court in the case Syed Jaleel Zane v. P. Venkata

Murlidhar AIR 1981 AP 328. The Apex Court also approved a decision of the Division Bench of Calcutta High Court in the case of Secretary of State of India in Council Vs. A.H. Forbes. The relevant proposition quoted with approval by the Apex Court and as mentioned in paragraph 15, 16 and 17 of the case of ***Lal Ji Tandon (supra)*** is being reproduced hereinafter:-

15. A Division Bench decision of the Andhra Pradesh High Court in Syed Jaleel Zane v. P. Venkata Murlidhar [AIR 1981 AP 328] wherein Jeevan Reddy, J., as His Lordship then was, spoke for the Division Bench makes almost an exhaustive discussion of the relevant English and Indian law available on the point and we express our respectful agreement with the exposition of law as made therein. We note with approval the following proposition of law laid down therein: (AIR pp. 332 & 334, paras 14 & 19)

(i) In India, the law does not prohibit a perpetual lease; clear and unambiguous language would be required to infer such a lease. If the language is ambiguous the court would opt for an interpretation negating the plea of the perpetual lease;

(ii) To find an answer to the question whether a covenant for renewal contained in the lease deed construed properly and in its real context, entitles the tenant to continue as long as he chooses by exercising the option of renewal at the end of each successive period of 5 years subject to the same terms and conditions depends on the deed of lease being read as a whole and an effort made to ascertain the intention of the parties while entering into the contract. No single clause or term should be read in isolation so as to defeat other clauses. The interpretation must be reasonable, harmonious and be deduced from the language of the document;

(iii) The court always leans against a perpetual renewal and hence where there is a clause for renewal subject to the same terms and conditions, it would be construed as giving a right to renewal for the same period as the period of the original lease, but not a right to second or third renewal and so on unless, of course, the language is clear and unambiguous.

16. Another illuminating decision on the point is by Sir Ashutosh Mookerjee, J., speaking for the Division Bench of the Calcutta High Court in Secy. of State for India in Council v. A.H. Forbes [(1912) 17 IC 180 : 16 CLJ 217 (Cal)] . The Division Bench on a review of several English decisions held:

"(1) A lease, which creates a tenancy for a term of years, may yet confer on the lessee an option of renewal.

(2) If the lease does not state by whom the option is exercisable, it is exercisable (as between the lessor and lessee) by the lessee only, that is to say, a covenant for renewal, if informally expressed, is enforced only in favour of the lessee.

(3) The option is exercisable not merely by the lessee personally but also by his representative-in-interest.

(4) If the option does not state the terms of renewal, the new lease will be for the same period and on the same terms as the original lease, in respect of all the essential conditions thereof, except as to the covenant for renewal itself.

(5) There is no sort of legal presumption against a right of perpetual renewal. The burden of strict proof is imposed upon a person claiming such a right. It should not be inferred from any equivocal expressions which may fairly be capable of being otherwise interpreted. The intention in that behalf should be clearly shown; otherwise, the agreement is satisfied and exhausted by a single renewal.

(6) A covenant for renewal runs with the land.

(7) The position of a lessee, who has been always ready and willing to accept a renewal on proper terms, is the same in equity as if a proper lease had been granted. Where the covenant for renewal was still specifically enforceable at the commencement of a suit for ejectment against the lessee, the position of the lessee in equity is the same as if it had been specifically enforced."

17.Green v. Palmer [(1944) 1 All ER 670 : 1944 Ch 328 : 113 LJ Ch 223 : 171 LT 49 (ChD)] bears a close resemblance with the facts of the present case. There the parties had entered into a lease agreement for six months. One of the covenants in the lease read so: (All ER p. 670 G-H)

"The tenant is hereby granted the option of continuing the tenancy for a further period of six months on the same terms and conditions including this clause, provided the tenant gives to the landlord in writing four weeks' notice of his intention to exercise his option."

The plea raised on behalf of the tenant was that the clause gave him a perpetual right of renewal. Uthwatt, J. of the Chancery Division held: (All ER p. 671 E-G)

"[T]he first thing one observes is that, in terms, there is granted to the tenant a single option exercisable only once upon the named event, and the subject-matter of that option is an option "of continuing the tenancy for a further period of six months on the same terms and conditions including this clause'. To my mind, what that means is this: the tenant is to be allowed once, and once only, the opportunity of continuing the tenancy -- continuing it for a further six months. Then we come to the critical words "on the same terms and conditions including this clause'. As I read it, that means there is included in the new tenancy agreement a right in the tenant, if he thinks fit, to go on for one further six months, and when you have got to that stage you have finished with the whole matter. In other words, it comes to this: "Here is your present lease. You may continue that, but I tell you, if you continue it, you continue it on the same terms as you were granted the original lease. You may continue it for a further 6 months with the right to go on for another 6 months.'

Upon that footing, in the events which have happened, all the landlord was bound to do under this arrangement was to permit the tenant to occupy for a period not exceeding 18 months in the whole from the time when the original lease was granted."

33. As far as the difference between renewal and extension of a lease is concerned, it will be noticed that where a covenant for renewal exists, it is exercised of course as a unilateral act by the lessee and the consent of the lessor is unnecessary. However, where the principal lease executed between the parties contains a renewal clause then the renewal has to take place in accordance with the said covenants and it must give rise to a fresh deed. However, in the case of extension, it is not necessary to have a fresh deed of lease executed as the extension of lease for the term agreed upon shall be a necessary consequence of the clause of extension but the option for renewal consistently with the covenant for the renewal has to be exercised in terms of the clause itself and failing the execution of a fresh deed, another lease for a fix term shall not come in existence, though, the principal lease inspite of the expiry of the term may continue by holding over. This aspect of the matter has been succinctly held by the Apex Court in paragraph 13 and 14 of the report in the case of ***Lal Ji Tandon (supra)*** which reads as under:-

"13. In India, a lease may be in perpetuity. Neither the Transfer of Property Act nor the general law abhors a lease in perpetuity. (Mulla on the Transfer of Property Act, 9th Edn., 1999, p. 1011.) Where a covenant for renewal exists, its exercise is, of course, a unilateral act of the lessee, and the consent of the lessor is unnecessary. (Baker v. Merckel [(1960) 1 All ER 668 : (1960) 1 QB 657 : (1960) 2 WLR 492 (CA)] , also Mulla, ibid., p. 1204.) Where the principal lease executed between the parties containing a covenant for renewal, is renewed in accordance with the said covenant, whether the renewed lease shall also contain similar clause for renewal depends on the facts and circumstances of each case, regard being had to the intention of the parties as displayed in the original covenant for renewal and the surrounding circumstances. There is a difference between an extension of lease in accordance with the covenant in that regard contained in the principal lease and renewal of lease, again in accordance with the covenant for renewal contained in the original lease. In the case of extension it is not necessary to have a fresh deed of lease executed, as the extension of lease for the term agreed upon shall be a necessary consequence of the clause for extension. However, option for renewal consistently with the covenant for renewal has to be exercised consistently with the terms thereof and, if exercised, a fresh deed of lease shall have to be executed between the parties. Failing the execution of a fresh deed of lease, another lease for a fixed term shall not come into existence though the principal lease in spite of the expiry of the term thereof may continue by holding over for year by year or month by month, as the case may be.

14. The issue whether a right to a new lease consequent upon the option for renewal having been successfully exercised should again contain the covenant for renewal, is not free from difficulty and has been the subject-matter of much debate both in England and in India. It would all depend on the wordings of the covenant for renewal contained in the principal lease, the intention of the parties as reflected therein and as determinable in the light of the surrounding relevant circumstances."

34. Applying the principles as extracted above and from the perusal of the material on record, it would indicate that the parties are not at variance in so far as the execution of the lease deed dated 13.04.2000 is concerned. It would indicate that the lease clearly provided for extension only for the period of 5 years on the same terms and conditions except that the lease rent would stand enhanced from Rs. 4,000/- to 5,000/- per month. The lease in Clause-II also contained a negative stipulation that after the expiry of the term which came to an end on 31.12.2006. The lessee shall not be entitled to exercise a further option of renewal of the tenancy and shall handover and **deliver the land and structure to the lessor.**

35. Once the execution of the lease is admitted and there is no material on record to indicate that the parties intended otherwise, while from the earlier lease onwards the term was always specified and no clause granted any right to the lessee to raise any permanent construction or that the lease was for a sufficiently long period to infer creation of a permanent lease. Moreover, as per the admitted case of the defendant in his written statement, that the lessor had instituted a SCC suit in 1977 wherein a compromise had been arrived at and as a consequence the lease was extended only till 1987. Thus, the material on record does not suggest any creation of lease of a permanent nature. There is no

case made out by the revisionist that the lease was in the nature of perpetual lease. The principles as noted in the decision of the Lal Ji Tandon (supra) are clearly attracted in the present case and the deed dated 13.04.2000 itself created a lease for a specific term with a negative stipulation disentitling the revisionist to seek a further option of renewal. In the aforesaid circumstances, it cannot be said that the lease was in perpetuity.

36. The learned counsel for the revisionist has relied upon a decision of the Patna High Court reported in ***(i) AIR 1924 Patna 88*** in the case of ***A.H. Forbes Vs. Hanuman Bhagat and Others, (ii) Society of State Vs. Itwari reported in AIR 1937 Alld. 572*** and ***(iii) Savitri Devi and Others Vs. First Additional District and Sessions Judge*** reported in ***1994 (24) ALR 181*** to buttress his submissions on the point of permanent lease.

37. In the case of A.H. Forbes (supra) the lease in question was open ended i.e. without any fix term. It is in view of the aforesaid matter that the Division Bench of the Patna High Court found that the surrounding circumstances and intention indicated that the lease was of a permanent nature. However, the said decision can clearly be distinguished, inasmuch as, in the present case the lease as noticed above was for a particular period and also it contained a negative stipulation not entitling the revisionist for any further extension.

38. In the case of Itwari (Supra), the Court considered the principle of estoppel and noticed that the plaintiffs had failed to deny or rebutt that the defendant was allowed to erect pakka construction, but in the instant case there is a lease between the parties with specific stipulation, nor there are any pleadings or evidence to invoke the doctrine of estoppel, hence, the said case cannot be pressed into service in the present case.

39. The case of Savitri Devi is also not applicable as it relates to the applicability of Order 41 Rule 27 C.P.C. in respect of revision under Section 25 of the Provincial Small Cause Court Act and hence the aforesaid decisions also does not come to the rescue of the revisionist and moreover in view of the law settled by the Apex Court in the case of Lal Ji Tandon (supra) as noticed above, the first submission of the learned counsel for the revisionist fails.

40. The other submission of the learned counsel for the revisionist as to whether the SCC Court had the jurisdiction to hear and try the suit is concerned, it would be seen that it is pleaded in the plaint as well as as per the covenants of the lease deed that land was leased out to the defendant-revisionist who was permitted to raise temporary constructions. It was also agreed that upon the expiry of the term or upon determination of the lease, the lessee would remove the said constructions in case if he failed to do so within a period of three months then the same would vest with the lessor.

41. In this view of the matter where upon the expiry of the term of the lease in the year 2006, the defendant-revisionist refused to remove the said constructions then as per the covenants of the lease, the same vested with the landlord. Clause 11 of the lease contains the specific stipulation which is being reproduced for ready reference:-

"That the second party will have the option to extend the lease of the said land and structure erected thereon for a further

period of five years on the expiry of the lease period, provided the second party gives a notice in writing by registered post to the first party of his intention to do so as at least three calender months before the termination of the present lease provided, as that with such notice the second party shall deposit with the First party the sum of Rs. 5,000/- as security for regular payment of rent during such extended term as hereinafter mentioned and for due performance of the term of tenancy. Provided further that the rent payable by the second party to the first party during the extended period of the lease shall be Rs. 5,000/- per month which will be the rent of the land under tenancy. ***After the expiry of the said fresh terms of Five years the second party shall not be entitled to exercise a further option of renewal of the tenancy and shall handover and deliver the land and structure (if not removed within three months) to the first party in a good condition as herein-before provided."***

..... .[Emphasis supplied by the Court]

42. From the perusal of the aforesaid clause, it would indicate that it was incumbent on the lessee to hand over and deliver the *land and structure* (if not removed within three months) to the lessor. This clearly indicates the intention of the parties which is manifested in the lease deed that in case if the lessee failed to remove the same, he was bound to handover both the land and the structures to the lessor.

43. Section 108 (q) of the Transfer of the Property Act also casts an obligation on the lessee to handover the vacant possession to the lessor. Whereas Section 108 (d) also indicates that any accession made to the property leased would vest with the lessor. The relevant portion of the aforesaid Section reads as under:-

108. Rights and liabilities of lessor and lessee.--In the absence of a contract or local usage to the contrary, the lessor and the lessee of immoveable property, as against one another, respectively, possess the rights and are subject to the liabilities mentioned in the rules next following, or such of them as are applicable to the property leased:--

*-------****------****----*

(A) Rights and Liabilities of the Lessor

(a) The lessor is bound to disclose to the lessee any material defect in the property, with reference to its intended use, of which the former is and the latter is not aware, and which the latter could not with ordinary care discover;

(b) the lessor is bound on the lessee's request to put him in possession of the property;

(c) the lessor shall be deemed to contract with the lessee that, if the latter pays the rent reserved by the lease and performs the contracts binding on the lessee, he may hold the property during the time limited by the lease without interruption.

The benefit of such contract shall be annexed to and go with the lessee's interest as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

(B) Rights and Liabilities of the Lessee

*------*****----****-------*

(d) If during the continuance of the lease any accession is made to the property, such accession (subject to the law relating to alluvion for the time being in force) shall be deemed to be comprised in the lease;

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(q) on the determination of the lease, the lessee is bound to put the lessor into possession of the property.

44. Thus, from the provisions of the Transfer of Property Act read in light of the covenants of the lease clearly indicates that the intention was that the structures would vest with the lessor in case if it is not removed. Admittedly, the defendant-revisionist did not remove the said constructions, hence, after having agreed and taken the benefit of the lease dated 13.04.2000 having enjoyed its complete term cannot approbate and reprobate by denying the same. Accordingly, this Court is of the view that the second submission regarding jurisdiction of the Court is also misconceived.

45. In light of the decisions of this Court in the case of Smt. Mehroonisha (supra). Govardhan Goyal (supra) as well for the reasons indicated hereinabove, the submissions of the learned counsel for the revisionist fails.

46. It has also been feebly argued by the revisionist that the revisionist was prevented by sufficient cause from contesting the proceedings before the SCC Court as the original defendant Sri Anil Singhal had suffered paralysis and for the said reasons, certain documents and material could not be placed on record of the Trial Court for which the application has been made before this Court and it has remained undisposed till the hearing began.

47. The Court has considered this aspect of the matter as well. In the instant case, the relationship of lessor and lessee is not disputed. The execution of the lease deed dated 13.04.200 is not disputed. The term of lease as agreed by the parties to the aforesaid lease has expired. The notice issued by the lessor terminating the tenancy is also not disputed. Apart from the fact that the two main issues raised by the revisionist have been considered and dealt with, hence, in this aforesaid factual background this Court at this stage is not inclined to entertain such a plea, accordingly, the same is also rejected and the application of the revisionist shall stand decided in terms of this judgment.

48. No other point has been pressed, accordingly, for the reasons recorded, the revision fails. The interim order, if any, shall stand vacated. The judgment passed by the Additional District Judge, Court No. 1, Barabanki acting as Small Causes Court dated 03.09.2012 in SCC Suit No. 3 of 2007 is affirmed.

49. The revision is dismissed. In the aforesaid facts and circumstances, there shall be no order as to costs. The office is directed to remit the record of the Trial Court to the court concerned within two weeks.

(2021)06ILR A425
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.06.2021

BEFORE

THE HON'BLE SURYA PRAKASH KESARWANI, J.
THE HON'BLE SHAMIM AHMED, J.

Crl. Misc. W.P. No. 16386 of 2020

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

Counsel for the Petitioners:

Sri Ganesh Shanker Srivastava, Sri Ashwini Kumar, Sri Deepak Kumar Srivastava

Counsel for the Respondents:
G.A.

Criminal Law – Code of Criminal Procedure,1973 – Sections 151, 107 & 116 - Writ filed claiming compensation for illegal detention in a case - Police authorities arbitrarily and illegally submitted challani reports-Section 107 cr.P.C. requires to issue show cause notice -mandatory provision breached-further even after submission of personal bond/ bail bond-petitioners were not released-breah of Article 21-State Government itself taken a policy decission and paid compensation and initiated disciplinary proceedings against officers concerned.

Held, *Section 111 Cr.P.C. provides that when a Magistrate acting under section 107, section 108, section 109 or section 110, deems it necessary to require any person to show cause under such section, he shall make an order in writing, setting forth (i) the substance of the information received, (ii) the amount of the bond to be executed, (iii) the term for which it is to be in force, and (iv) the number, character and class of sureties (if any) required. These necessary ingredients of Section 111 Cr.P.C. are totally absent in the order dated 08.10.2020 passed by the respondent no.3. Thus, it is evident on record that the respondent no.3 has acted arbitrarily and illegally.***(para 13)**

W.P. disposed. (E-8)

List of Cases cited:

1. Lucknow Development Authority Vs M.K. Gupta (1994) 1 SCC 243

2.Jay Laxmi Salt Works (P) Ltd. Vs St. of Guj. (1994) 4 SCC 1;

3. N. Nagendra Rao & Co. Vs St. of A.P. (1994) 6 SCC 205;

4. State of Maharashtra & ors. Vs Kanchanmala Vijaysing Shirke & ors. (1995) 5 SCC 659;

5. Chief Conservator of Forests & anr. (1996) 2 SCC 293;

6. S.P. Goel Vs Collector Of Stamps, Delhi (1996) 1 SCC 573;

7. Common Cause A. Registered Society Vs U.O.I. JT 1999 (5) SC 237: AIR 1999 SC 2979;

8. Shiv Sagar Tiwari Vs U.O.I. & ors. (1996) 6 SCC 558;

9. Chairman, Railway Board & ors. Vs Chandrima Das (Mrs.) & ors. (2000) 2 SCC 465;

10. St. of A.P. Vs Challa Ramkrishna Reddy & ors. (2000) 5 SCC 712;

11. Research Foundation for Science (10) Vs U.O.I. (2005) 13 SCC 659;

12. M.C. Mehta Vs U.O.I. & ors. (2006) 3 SCC 399;

13.U.O.I. Vs Prabhakaran Vijaya Kumar & ors. (2008) 9 SCC 527;

14. Action Committee, Unaided Private Schools & ors. Vs Director of Education, Delhi & ors. (2009) 10 SCC;

15. Delhi Jal Board Vs National Campaign for Dignity and Rights of Sewerage & Allied Workers & ors. (2011) 8 SCC 568;

16. Municipal Corporation of Delhi, Delhi Vs Uphaar Tragedy Victims Association & ors. (2011) 14 SCC 481.

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

1. Heard Sri Ashwini Kumar, learned counsel for the petitioners and Sri Manish Goyal, learned Additional Advocate General assisted by Sri S.K. Pal, learned Government Advocate and Sri Ali Murtuza, learned A.G.A. for the State-respondents.

2. This writ petition has been filed praying for the following reliefs:

"i) Issue a writ, order or direction in the nature of mandamus directing the respondents to give compensation to the petitioners in lieu of illegal detention from 12.10.2020 to 21.10.2020 in connection with Case Crime No.624 of 2020, State vs. Shiv Kumar Verma and another, under Section 151, 107 and 116 Cr.P.C., Police Station Rohania, District Varanasi."

Facts

3. Briefly stated, facts of the present case are that there was some dispute relating to ancestral property between the petitioners and their family members. In paragraph 3 of the writ petition, it has been stated that some tiff arose between the petitioners and other family members, namely, Rajendra Prasad, Shiv Kumar Verma and Raj Kumar Verma regarding partition of an ancestral land and in apprehension of breach of public peace, the police arrested the petitioners under Section 151 Cr.P.C. on 08.10.2020. A Challani Report dated 08.10.2020 was submitted by the Sub Inspector, Police Station Rohania, District Varanasi to the Sub Divisional Magistrate, District Varanasi under Section 151/107/116 Cr.P.C., which was in printed form and merely name of the petitioners and others, name of village and "land dispute" have been filled by ink in the aforesaid Challani Report. On receipt of the Challani Report, the Sub Divisional Magistrate registered the case as Case No.624 of 2020 (State vs. Shiv Kumar Maurya and others) and passed the following order on 08.10.2020:

"मु0स0 624 सन् 2020
सरकार बनाम शिवकुमार मौर्य आदि
धारा–515/107/116 द0प्र0सं0
थाना–रोहनिया
08.10.2020

आज थानाध्यक्ष रोहनिया जनपद वाराणसी द्वारा अन्तर्गत धारा 151/107/116 द0प्र0सं0 के अन्तर्गत चालानी रिपोर्ट सरकार बनाम शिवकुमार मौर्य आदि प्रस्तुत किया गया अभियुक्तगण के जमानत हेतु बन्ध पत्र व शपथ पत्र व मुचलका दाखिल नहीं किया गया।

अतः अभियुक्तगण के जमानत हेतु बन्ध पत्र व मुचलका के उपलब्धता तक **अभियुक्तगण को निरूद्व जेल किया जाता है**। पत्रावली दिनांक 21.10.2020 को पेश हो।

अ0ह0
सत्यप्रतिलिपि
08-10-2020"

4. It appears that on 12.10.2020 the petitioners submitted personal bond and other papers but the respondent no.3 has not released them and instead, under the pretext of verification, directed the file to be placed on 21.10.2020. The order dated 12.10.2020 passed by the respondent no.3 is reproduced below:

"12.10.2020

पत्रावली पेश। अभियुक्तगण द्वारा जमानत प्रार्थना पत्र व बन्ध पत्र/ मुचलका दाखिल किया गया बन्ध पत्र में संलग्न जमानदारी को खतौनी का मुल्यांकन हेतु तहसीलदार राजस्व को प्रेषित व राज पत्रिक अधिकारी द्वारा जारी अभियुक्तगणे का चरित्र प्रमाण पत्र दो प्रति अतः पत्रावली दिनांक 21.10.2020 को पेश हो।

अ0ह0
सत्यप्रतिलिपि 12.10.2020"

5. Thereafter, on 21.10.2020 the petitioners were released. Aggrieved with the arbitrary and illegal action of the respondents and illegal detention, the petitioners have filed the present writ petition praying for the relief as afore-quoted.

Discussion and Findings

6. We have carefully considered the submissions of learned counsels for the parties.

Action taken by the State Government

7. In paragraph 8 of the counter affidavit dated 02.02.2021, the respondent no.1 has stated that the State Government has taken corrective action in the matter vide letters/circulars dated 30th January, 2021 and 31st January, 2021. The aforesaid letters/circulars dated 30th January, 2021 and 31st January, 2021 are reproduced below:

"Letter/Circular dated 30th January, 2021

फैक्स/ई–मेल/ महत्वपूर्ण

संख्या– 159/6–पु0–11–21–05 रिट/2021

प्रेषक,
तरूण गाबा,
सचिव,
उत्तर प्रदेश शासन।

सेवा में,
पुलिस महानिदेशक,
उत्तर प्रदेश।

गृह(पुलिस)अनुभाग–11 लखनऊः दिनांकः30 जनवरी,2021

विषयः– क्रिमिनल (मिस0) रिट याचिका संख्या– 16386/2020, शिव कुमार वर्मा व अन्य बनाम उ0प्र0 राज्य व अन्य में पारित मा0 उच्च न्यायालय के आदेश दिनांक 13.01.2021 के अनुपालन में दिशा–निर्देश निर्गत करने के सम्बन्ध में।

महोदय,

उपर्युक्त विषयक क्रिमिनल (मिस0) रिट याचिका संख्या– 16386/2020, शिव कुमार वर्मा व अन्य बनाम उ0प्र0 राज्य व अन्य में पारित मा0 उच्च न्यायालय के आदेश दिनांक 13.01.2021 (प्रति संलग्र) का कृपया अवलोकन करने का कष्ट करें।

2– इस सम्बन्ध में मुझे यह कहने का निदेश हुआ है कि मा0 उच्च न्यायालय, इलाहाबाद द्वारा पारित उपर्युक्त आदेश दिनांक 13.01.2021 के दृष्टिगत निम्नलिखित बिन्दुओं को सम्मिलित करते हुए समस्त **सम्बन्धित अधीनस्थ अधिकारियों को अपने स्तर से विस्तृत दिशा–निर्देश निर्गत करने का कष्ट करें:–**

(1) 107/116/116 (3) सीआरपीसी व 151 सीआरपीसी इत्यादि निरोधात्मक कार्यवाही का **चालानी रिपोर्ट प्रिन्टेड प्रोफार्मा पर प्रेषित न किया जाए।**

(2) प्रत्येक मामले में **विवाद से सम्बन्धित पूर्ण/सुस्पष्ट एवं तथ्यात्मक विवरण (सुविचारित कारणों सहित) अंकित किया जाए।**

(3) प्रत्येक चालानी रिपोर्ट के साथ प्रकरण से सम्बन्धित आवश्यक प्रपत्र, जैसे प्रार्थना पत्र, एनसीआर की प्रति इत्यादि अवश्य संलग्र किये जाए।

(4) प्रत्येक चालानी रिपोर्ट यदि किसी चौकी प्रभारी अथवा उप निरीक्षक द्वारा तैयार की जाती है तो उस पर सम्बन्धित प्रभारी निरीक्षक/थानाध्यक्ष द्वारा परीक्षण कर अपनी स्पष्ट एवं तथ्यात्मक टिप्पणी अंकित करने के उपरान्त ही अग्रिम कार्यवाही हेतु प्रेषित की जाए।

संलग्रकः यथोपरि।
भवदीय
(तरूण गाबा)
सचिव।"

8. In compliance to the aforequoted Government Order dated 30.01.2021, the Director General of Police, Uttar Pradesh has issued a Circular being letter No. Mhth&vkB&94 ¼funsZ'k½ 2021, dated 31.01.2021 to all the Zonal Additional Director General of Police, Uttar Pradesh, and all the Police Commissioners, Uttar Pradesh and directed them to ensure strict compliance of the aforequoted Government order.

9. From the facts briefly noted above and the counter affidavit of respondent no.1, it stands admitted that the police authorities are arbitrarily and illegally submitting Challani Reports under Sections 107/116 Cr.P.C. Since the respondent no.1 has taken steps to correct the mistakes and illegalities, therefore, we do not propose to issue any further direction in that regard, except **that the afore-quoted Circulars dated 30th January, 2021 and 31st January, 2021 shall be strictly**

implemented in the whole of the State of Uttar Pradesh.

10. In the counter affidavit dated 01.02.2021, **the respondent no.3 has stated in paragraph 5 and** 8 that "the petitioners submitted the applications through their counsel that they are ready to furnish personal bonds as well as bail bonds, therefore, they may be released on bail and **the answering respondent directed the concerned Tehsildar to verify the revenue records produced by the sureties and on verification the petitioners shall be released on 21.10.2020 on bail**."

11. In his counter affidavit, the respondent no.3 has tried to justify his arbitrary action and clear breach of statutory duty cast upon him as well as the fundamental rights guaranteed under Article 14 and 21 of the Constitution of India. In this regard, it would be appropriate to refer to the provisions of **Sections 107, 111 and 116 of the Code of the Criminal Procedure, 1973**, which are reproduced below:

"107. **Security for keeping the peace in other cases**.

(1) When an Executive Magistrate receives information that any person is ***likely to commit a breach of the peace or disturb the public tranquillity or to do any wrongful act*** *that may probably occasion a breach of the peace or disturb the public tranquillity and is of opinion that there is sufficient ground for proceeding, he may, in the manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with or without sureties, for keeping the peace for such period, not exceeding one year, as the Magistrate thinks fit.*

(2) Proceedings under this section may be taken before any Executive Magistrate when either the place where the breach of the peace or disturbance is apprehended is within his local jurisdiction or there is within such jurisdiction a person who is likely to commit a breach of the peace or disturb the public tranquillity or to do any wrongful act as aforesaid beyond such jurisdiction.

"111. ***Order to be made****. When a* ***Magistrate*** *acting under section 107, section 108, section 109 or section 110, deems it necessary to require any person to show cause under such section,* ***he shall make an order in writing, setting forth the substance of the information received, the amount of the bond to be executed, the term for which it is to be in force, and the number, character and class of sureties*** *(if any) required."*

"116. Inquiry as to truth of information.

(1) When an order under section Ill has been read or explained under section 112 to a person present in Court, or when any person appears or is brought before a Magistrate in compliance with, or in execution of, a summons or warrant, issued under section 113, the Magistrate shall proceed to inquire into the truth of the information upon which action has been taken, and to take such further evidence as may appear necessary.

(2) Such inquiry shall be made, as nearly as may be practicable, in the manner hereinafter prescribed for conducting trial and recording evidence in summons- cases.

(3) After the commencement, and before the completion, of the inquiry under sub- section (1), ***the Magistrate****, if he*

considers that immediate measures are necessary for the prevention of a breach of the peace or disturbance of the public tranquillity or the commission of any offence or for the public safety, ***may, for reasons to be recorded in writing, direct the person*** *in respect of whom the order under section 111 has been made* ***to execute a bond, with or without sureties****, for keeping the peace or maintaining good behaviour until the conclusion of the inquiry,* ***and may detain him in custody until such bond is executed or, in default of execution, until the inquiry is concluded: Provided that-***

(a) no person against whom proceedings are not being taken under section 108, section 109, or section 110 shall be directed to execute a bond for maintaining good behaviour;

(b) the conditions of such bond, whether as to the amount thereof or as to the provision of sureties or the number thereof or the pecuniary extent of their liability, shall not be more onerous than those specified in the order under section 111.

(4) For the purposes of this section the fact that a person is an habitual offender or is so desperate and dangerous as to render his being at large without security hazardous to the community may be proved by evidence of general repute or otherwise.

(5) Where two or more persons have been associated together in the matter under inquiry, they may be dealt with in the same or separate inquiries as the Magistrate shall think just.

(6) The inquiry under this section shall be completed within a period of six months from the date of its commencement, and if such inquiry is not so completed, the proceedings under this Chapter shall, on the expiry of the said period, stand terminated unless, for special reasons to be recorded in writing, the Magistrate otherwise directs: Provided that where any person has been kept in detention pending such inquiry, the proceeding against that person, unless terminated earlier, shall stand terminated on the expiry of a period of six months of such detention.

(7) Where any direction is made under sub- section (6) permitting the continuance of proceedings, the Sessions Judge may, on an application made to him by the aggrieved party, vacate such direction if he is satisfied that it was not based on any special reason or was perverse."

12. Section 107 Cr.P.C. requires the Magistrate receiving the information that any person is likely to commit a breach of peace or disturb the public tranquillity or to do any wrongful act that may probably occasion a breach of peace or disturb the public tranquility **and is of opinion that there is sufficient ground for proceeding**, he may, in the manner provided, **require such person to show cause why he should not be ordered to execute a bond, with or without sureties, for keeping the peace for such period, not exceeding one year, as the Magistrate thinks fit**. Perusal of the order dated 08.10.2020, passed by the respondent no.3 would reveal that there is no such satisfaction recorded by the respondent no.3. The aforesaid order dated 08.10.2020 would further reveal that the respondent no.3 has not required the petitioners to show cause that why they should not be ordered to execute a bond with or without sureties. Thus, the respondent no.3 has committed clear breach of mandate of Section 107 Cr.P.C.

13. Section 111 Cr.P.C. provides that **when a Magistrate acting under section 107, section 108, section 109 or section 110, deems it necessary to require any**

person to show cause under such section, he shall make an order in writing, setting forth **(i)** the substance of the information received, **(ii)** the amount of the bond to be executed, **(iii)** the term for which it is to be in force, and **(iv)** the number, character and class of sureties (if any) required. These necessary ingredients of Section 111 Cr.P.C. are totally absent in the order dated 08.10.2020 passed by the respondent no.3. Thus, it is evident on record that the respondent no.3 has acted arbitrarily and illegally.

14. It would further be relevant to note that admittedly the petitioners have submitted personal bond on 12.10.2020 although the order passed by the respondent no.3 dated 08.10.2020 does not specify the substance of the information received, the amount of the bond to be executed, the term for which it is to be in force, and the number, character and class of sureties, if any, required. **Despite submission of personal bond and other papers on 12.10.2020 by the petitioners before the respondent no.3, they were not released by the respondent no.3 and that too against his own order dated 08.10.2020 that the petitioners shall be detained till presentation of personal bond/bail bond. Non release of the petitioners by the respondent no.3 even after submission of personal bond/bail bond and other papers, is a clear breach of Article 21 of the Constitution of India, by the respondent no.3** which resulted in illegal detention of the petitioners at least since 12.10.2020 to 21.10.2020.

15. On 02.02.2021 this Court noted the statement made by the State Government in Paragraph 15 of the order dated 02.02.2021 as under:

*"15. Learned Additional Advocate General and the Secretary, Home, U.P. Lucknow jointly state that the **State Government shall develop a mechanism and shall also issue appropriate guidelines so as to ensure that such instances may not repeat again.** They further state that the **State Government shall consider to grant monetary compensation to the petitioners** for breach of their fundamental rights under Article 21 of the Constitution of India."*

16. In pursuance to the statement made on own behalf of the **State government as noted in the aforequoted paragraph 15 of the order dated 02.02.2021, the State Government filed an affidavit of compliance dated 24.03.2021 of Sri Tarun Gauba, Secretary, Home Affairs**, Uttar Pradesh, in which in paragraph 10 it has been stated as under :

*"That it is most respectfully submitted that the **State Government has issued directions to all District Magistrates and all Executive and Special Magistrates** who are sub ordinate to the District Magistrates, to exercise their power under Section 107, 116 Cr.P.C. for maintenance of public peace and public tranquility in their territorial jurisdiction. They have been further advised that each and every case under the aforesaid proceedings shall be decided on its own merit with the application of judicial mind and in accordance with the established law & procedure to ensure that the fundamental rights of citizens are protected. The State Government has directed all the District Magistrates of the State to ensure strict compliance of the policy/guideline dated 23rd March, 2021. **The State Government has reformulated the earlier policy dated 02.03.2021 and after including the aforementioned issues it has re-issued***

policy/guideline dated 23rd March, 2021. *For kind perusal of this Hon'ble Court copy of policy/guideline dated 23rd March, 2021 is being filed herewith and marked as* ***Annexure-1*** *to this affidavit."*

17. The policy of the State Government dated 23.03.2021 appended as Annexure 1 to the aforesaid affidavit of compliance dated 24.03.2021, is reproduced below :-

महत्वपूर्ण/दिशा–निर्देश
संख्या–580पी/6–पू0–3–2021
प्रेषक,
अवनीश कुमार अवस्थी
अपर मुख्य सचिव,
उ0 प्र0 शासन।
सेवा में,
समस्त जिलाधिकारी,
उत्तर प्रदेश।

गृह (पुलिस) अनुभाग–3 लखनऊ : दिनांक : 23 मार्च, 2021

विषय :– क्रिमिनल मिस रिट पिटीशन संख्या–16386/2020, शिव कुमार वर्मा एवं अन्य बनाम उ0 प्र0 राज्य व अन्य में मा0 उच्च न्यायालय, इलाहाबाद द्वारा पारित आदेश दिनांक 02.02.2021 के अनुपालन के संबंध में दिशा–निर्देश।

महोदय,

उपर्युक्त विषयक शासन के पत्र संख्या–392पी/6–पु0–3–2021, दिनांक 02 मार्च, 2021 का कृपया संदर्भ ग्रहण करने का कष्ट करें, जिसके माध्यम से मा0 उच्च न्यायालय, इलाहाबाद में योजित क्रिमिनल मिस रिट पिटीशन संख्या–16386/2020, शिव कुमार वर्मा एवं अन्य बनाम उ0 प्र0 राज्य व अन्य में मा0 उच्च न्यायालय द्वारा पारित आदेश दिनांक 02.02.2021 के अनुपालन में परिशान्ति कायम रखने के उद्देश्य से दण्ड प्रकिया संहिता, 1973 के अधीन धारा 107/116/151 के तहत कार्यकारी मजिस्ट्रेट को प्राप्त शक्तियों के क्रियान्वन के विषय में अपेक्षित दिशा–निर्देश निर्गत किये गये थे।

2. क्रिमिनल मिस रिट पिटीशन संख्या–16386/2020, शिव कुमार वर्मा एवं अन्य बनाम उ0 प्र0 राज्य व अन्य में मा0 उच्च न्यायालय द्वारा पारित आदेश दिनांक 03.03.2021 में कतिपय बिन्दुओं को उक्त दिशा–निर्देश में समावेशित किये जाने के आदेश दिये गये हैं।

3– मा0 उच्च न्यायालय द्वारा पारित उक्त आदेश दिनांक 03.03.2021 के अनुपालन में शासन के पत्र संख्या–393पी/6–पु0–3–2021, दिनांक 02 मार्च, 2021 को अवक्रमित करते हुए सम्यक् विचारोपरान्त परिशान्ति कायम रखने के उद्देश्य से दण्ड प्रक्रिया संहिता, 1973 के अधीन धारा 107/116/151 के तहत कार्यकारी मजिस्ट्रेट को प्राप्त शक्तियों के क्रियान्वन के विषय में संलग्नानुसार अपेक्षित दिशा–निर्देश निर्गत किये जाते हैं।

4– कृपया उक्त दिशा–निर्देशों का कड़ाई से अनुपालन कराना सुनिश्चित करने का कष्ट करें।

संलग्नकः यथोपरि।

भवदीय,
ह0 अपठनीय
(अवनीश कुमार अवस्थी)
अपर मुख्य सचिव।
संख्या एवं दिनांक तदैव।

प्रतिलिपि निम्नलिखित को सूचनार्थ एवं आवश्यक कार्यवाही हेतु प्रेषितः–

(1) पुलिस महानिदेशक, उ0 प्र0 लखनऊ।

(2) अपर पुलिस महानिदेशक, समस्त जोन, उ0 प्र0।

(3) पुलिस महानिरीक्षक/उप महानिरीक्षक, समस्त परिक्षेत्र, उ0 प्र0

(4) वरिष्ठ पुलिस अधीक्षक/पुलिस अधीक्षक, समस्त जनपद,उ0 प्र0।

आज्ञा से,
ह0 अपठनीय
(अवनीश कुमार अवस्थी)
अपर मुख्य सचिव।

परिशान्ति कायम रखने के उद्देश्य से दण्ड प्रकिया संहिता, 1973 के अधीन धारा 107/116/151 के तहत कार्यकारी मजिस्ट्रेट को प्राप्त शक्तियों के क्रियान्वन के विषय मे दिशा–निर्देशः–

अपने अधिकारिता क्षेत्र के अन्तर्गत परिशान्ति कायम रखने के लिए ऐसे व्यक्तियों, जिनसे परिशान्ति भंग होने अथवा लोक प्रशान्ति विक्षुब्ध होने की सम्भावना है, के खिलाफ निरोधक कार्यवाहियां किये जाने हेतु दण्ड प्रकिया संहिता, 1973 के अन्तर्गत कार्यकारी मजिस्ट्रेट को यथानिर्दिष्ट अधिकार दिये गये है तथा इसकी पूरी

प्रक्रिया का विधिवत् उल्लेख भी किया गया है, तथापि यदाकदा ऐसे दृष्टान्त सामने आते है जिनसे यह आभासित होता है कि सम्बन्धित कार्यकारी मजिस्ट्रेट ने बिना न्यायिक मस्तिष्क का प्रयोग किये आदेश पारित किया है अथवा निर्धारित प्रक्रिया का समुचित अनुपालन नही किया है। ऐसे ही एक प्रकरण (क्रिमिनल रिट पिटीशन संख्या– 16386/2020, शिवकुमार वर्मा एवं अन्य बनाम उ0 प्र0 राज्य एवं अन्य, आदेश दिनांक 02.02.2021) में मा0 उच्च न्यायालय, इलाहाबाद ने सम्बन्धित कार्यकारी मजिस्ट्रेट द्वारा निर्गत आदेशों को सम्यक् न मानते हुए एक उचित कार्यप्रणाली (डमबींदपेउ) विकसित किये जाने तथा यथोचित दिशा–निर्देश निर्गत किये जाने का आदेश दिया है।

शांति व्यवस्था व लोक प्रशांति बनाये रखने के उद्देश्य से निरोधक कार्यवाहियों के विषय मे दण्ड प्रक्रिया संहिता, 1973 के अन्तर्गत कार्यकारी मजिस्ट्रेट की अधिकारिता एवं प्रक्रिया का विधिवत् उल्लेख किया गया है। आवश्यकता इस बात की है कि कार्यकारी मजिस्ट्रेट द्वारा अपने न्यायिक मस्तिष्क का प्रयोग करते हुए एवं निर्धारित प्रक्रिया का अनुपालन करते हुए प्रत्येक स्तर पर मुखरित (चमांपदह) आदेश पारित किए जायें। निरोधक कार्यवाहियों के विषय में दण्ड प्रक्रिया संहिता, 1973 में उल्लेखित सुसंगत प्रावधान एवं उनके विषय में अपेक्षित मार्ग–निर्देश निम्नवत् जारी किए जा रहे है :–

1–धारा–107–(परिशान्ति कायम रखने के लिए प्रतिभूति) के विषय में–

इस विषय में दण्ड प्रक्रिया संहिता मे मुख्य प्रावधान निम्नवत् हैं–

जब किसी कार्यपालक मजिस्ट्रेट को इत्तिला मिलती है कि सम्भाव्य है कि उसके अधिकारिता क्षेत्र में कोई व्यक्ति परिशान्ति भंग करेगा या लोक प्रशान्ति विक्षुब्ध करेगा या कोई ऐसा सदोष कार्य करेगा जिससे सम्भाव्यतः परिशान्ति भंग हो जाएगी या लोक प्रशान्ति विक्षुब्ध हो जाएगी तब यदि उसकी राय में कार्यवाही करने के लिए पर्याप्त आधार है तो वह, ऐसे व्यक्ति से इसमें इसके पश्चात् उपबन्धित रीति से अपेक्षा कर सकता है कि वह कारण दर्शित करे कि एक वर्ष से अनधिक की इतनी अवधि के लिए, जितनी मजिस्ट्रेट नियत करना ठीक समझे, परिशान्ति कायम रखने के लिए उसे प्रतिभुओं सहित या रहित बन्ध पत्र निष्पादित करने के लिए आदेश क्यों न दिया जाए।

<u>धारा – 151– संज्ञेय अपराधों का किया जाना रोकने के लिए गिरफतारी के विषय में प्रावधान निम्नवत् है –</u>

(1) कोई पुलिस अधिकारी जिसे किसी संज्ञेय अपराध करने की परिकल्पना का पता है, ऐसी परिकल्पना करने वाले व्यक्ति को मजिस्ट्रेट के आदेशों के बिना और वारण्ट के बिना उस दशा में गिरफतार कर सकता है, जिसमें ऐसे अधिकारी को प्रतीत होता है कि उस अपराध का किया जाना अन्यथा नहीं रोका जा सकता।

;2द्ध उपधारा (1) के अधीन गिरफ्तार किए गए किसी व्यक्ति को उसकी गिरफतारी के समय से चौबीस घण्टे की अवधि से अधिक के लिए अभिरक्षा में उस दशा के सिवाय निरुद्ध नही रखा जाएगा जिसमें उसका और आगे निरुद्ध रखा जाना इस संहित के या तत्समय प्रवृत्त किसी अन्य विधि के किन्ही अन्य उपबन्धो के अधीन अपेक्षित या प्राधिकृत है।

<u>उपरोक्त दोनो धाराओं के अन्तर्गत स्थानीय पुलिस अथवा अन्य प्राधिकारी द्वारा कार्यकारी मजिस्ट्रेट को इत्तिला दिये जाने (चालानी रिपोर्ट) के विषय मे निम्नवत् दिशा–निर्देश दिये जाते है –</u>

107/151 सीआरपीसी की चालानी रिपोर्ट प्रिन्टेड प्रोफार्मा पर रिक्ति को भरते हुए (पिससपदह जीम इसंदो) प्रेषित न किया जाए अपितु प्रत्येक प्रकरण की मेरिट को दर्शित करते हुए मुखरित आख्या भेजी जाए।

प्रत्येक मामले मे विवाद से समबन्धित पूर्ण, सुस्पष्ट एवं तथ्यात्मक विवरण (सुविचारित कारणों सहित) अंकित की जाए। यह भी स्पष्ट किया जाए कि आरोपी व्यक्ति या व्यक्तियों से शांति भंग की संभावना किस आधार पर है।

प्रत्येक चालानी रिपोर्ट के साथ प्रकरण से सम्बन्धित आवश्यक प्रपत्र, जैसे प्रार्थना पत्र, एनसीआर की प्रति इत्यादि अवश्य संलग्न किये जाए।

प्रत्येक चालानी रिपोर्ट यदि किसी चौकी प्रभारी अथवा उप निरीक्षक द्वारा तैयार की जाती है तो उस पर सम्बन्धित प्रभारी निरीक्षक/थानाध्यक्ष द्वारा परीक्षण कर अपनी स्पष्ट एवं तथ्यात्मक टिप्पणी अंकित करने के उपरान्त ही अग्रिम कार्यवाही हेतु प्रेषित की जाए।

यदि 107/116 की चालानी रिपोर्ट के साथ आरोपी व्यक्ति को दण्ड प्रक्रिया संहिता की धारा–151 के तहत गिरफतार कर मजिस्ट्रेट के समक्ष प्रस्तुत भी किया जा रहा है तो ऐसी स्थिति में चालानी रिपोर्ट मे विशिष्ट रुप से यह स्पष्ट किया जाना आवश्यक है कि किस संज्ञेय अपराध को कारित करने हेतु आरोपी व्यक्ति प्रवृत्त था, जिसे अन्यथा नही रोका जा सकता था और रोकने के लिए उसे गिरफतार किया जाना आवश्यक था।

2– धारा–111–(प्रांरभिक आदेश/नोटिस) के विषय में –

इस विषय मे दण्ड प्रकिया संहिता में मुख्य प्रावधान निम्नवत् है –

जब कोई मजिस्ट्रेट, धारा 107, धारा 108, धारा 109, या धारा 110 के अधीन कार्य कर रहा है, यह आवश्यक समझता है कि किसी व्यक्ति से अपेक्षा की जाए कि वह उस धारा के अधीन कारण दर्शित करे तब वह मजिस्ट्रेट प्राप्त इत्तिला का सार, उस बन्धपत्र की रकम, जो निष्पादित किया जाना है, वह अवधि जिसके वह प्रवर्तन में रहेगा और प्रतिभुओं की (यदि कोई हो) अपेक्षित संख्या, प्रकार और वर्ग बताते हुए लिखित आदेश देगा।

इस सम्बन्ध में निम्नवत् दिशा–निर्देश निर्गत किए जाते है –

कार्यकारी मजिस्ट्रेट को भली भांति यह संज्ञानित होना आवश्यक है कि उस धारा के अन्तर्गत निर्गत आदेश एक प्रारम्भिक आदेश है जिसके द्वारा आरोपी व्यक्ति को कारण दर्शित करने के लिए संसूचित किया जाता है कि उसके द्वारा शांतिभंग करने अथवा लोक प्रशांति विक्षुब्ध करने की संभावना को देखते हुए शांति व्यवस्था बनाये रखने के उद्देश्य से एक निश्चित अवधि हेतु क्यों न बन्धपत्र (प्रतिभू सहित/ प्रतिभू रहित) प्रस्तुत करने हेतु आदेश दिये जाए।

इस धारा के अधीन आरोपी को अन्तरिम अथवा अंतिम रुप से बन्धित नही किया जा सकता। इस प्रारंभिक आदेश के बाद आवश्यक जांच/साक्ष्य संकलन के पश्चात् ही मेरिट पर आदेश निर्गत किया जाना उचित है। विशिष्ट/आपातिक परिस्थिति में यदि जांच/साक्ष्य संकलन की अवधि में भी आरोपी व्यक्ति द्वारा शांति भंग किए जाने की संभावना हो और मजिस्ट्रेट को इस आशय का समाधान हो तो जांच की अवधि तक लिए अंतरिम रुप से धारा–116(3) के तहत बन्धपत्र/प्रतिभू प्रस्तुत करने हेतु आदेश दिया जा सकता है। परन्तु किसी भी दशा में धारा–111 के प्रारंभिक आदेश में ही बन्धपत्र/जमानत के विषय में अंतरिम या अंतिम आदेश नही दिया जाना चाहिए, इसी प्रकार धारा–116(3) के अन्तर्गत अंतरिम पाबन्दी आदेश, धारा–111 के अन्तर्गत प्रारंभिक आदेश जारी किए बिना नही किया जाना चाहिए।

इसे छपे–छपाये प्रोफार्मा पर निर्गत नही किया जाना चाहिए अपितु एक लिखित/टंकितशुदा व मुखरित आदेश निर्गत किया जाना चाहिए।

प्रारंभिक आदेश में इत्तिला का स्रोत एवं इत्तिला के सार का उल्लेख अवश्य किया जाए। सार शब्द से आशय है कि इत्तिला के महत्वपूर्ण अंशो का निचोड़ उल्लेखित होना चाहिए, तात्पर्य यह है कि नोटिस मे इस बात का उल्लेख होना चाहिए कि किन आधारों पर किसी व्यक्ति को पाबन्द करने का प्रस्ताव है, जिससे वह इनका उत्तर दे सके।

कार्यकारी मजिस्ट्रेट से अपेक्षित है कि वो प्रारंभिक आदेश में, उन्हें दी गयी इत्तिला में अंकित तथ्य एवं विवरण के प्रति अपना समाधान अवश्य अंकित करें।

प्रारंभिक आदेश में बन्धपत्र की धनराशि एवं अवधि का स्पष्ट उल्लेख होना चाहिए (यह अवधि धारा–107/108/109 के प्रकरण में एक वर्ष से अधिक नही होगी तथा धारा–110 के प्रकरण में तीन वर्ष से अधिक नहीं होगी।)

यदि मजिस्ट्रेट को यह समाधान होता है कि बन्धपत्र के साथ प्रतिभू लिया जाना भी आवश्यक है तो धारा–111 के अन्तर्गत निर्गत प्रारंभिक आदेश में ही प्रतिभू की संख्या, प्रकृति तथा वर्ग (छनउइमतए बींतंबजमत ंदक बसें वि नतमजपमे) का स्पष्ट उल्लेख किया जाना चाहिए।

3. धारा 112,113,114,115 से सम्बन्धित प्रावधान एवं दिशा–निर्देश–

इन धाराओ में उल्लिखित प्रावधान स्वतः स्पष्ट है, तथापि इस विषय में कतिपय तथ्य स्पष्ट किया जाना आवश्यक है, यथा कि –

यदि यह व्यक्ति जिसके बारे मे प्रारंभिक आदेश दिया गया है, न्यायालय में उपस्थित है तो उसे पढ़कर सुनाया जाएगा और यदि वह ऐसा चाहे तो उसका सार भी उसे समझाया जाएगा।

यदि ऐसा व्यक्ति न्यायालय मे उपस्थित नही है तो मजिस्ट्रेट उससे हाजिर होने की अपेक्षा करते हुए समन जारी करेगा।

यदि ऐसा व्यक्ति अभिरक्षा में है तब वह जिस अधिकारी की अभिरक्षा में है उस अधिकारी को, उसे न्यायालय के समक्ष लाने का निर्देश देते हुए वारन्ट जारी करेगा।

यदि प्राप्त इत्तिला से मजिस्ट्रेट को इस बात का समाधान है, कि आरोपी व्यक्ति द्वारा परिशांति भंग होने के पर्याप्त कारण है और आरोपी व्यक्ति की तुरन्त गिरफतारी के बिना ऐसे परिशांति भंग करने का निवारण नही किया जा सकता है, तब मजिस्ट्रेट उसकी गिरफतारी के लिए किसी समय वारण्ट जारी कर सकता है।

ऐसे प्रत्येक समन/वारण्ट के साथ धारा–111 के अधीन दिये गये प्रारंभिक आदेश की प्रति संलग्न किया

जाना तथा आरोपी पर तामीला कराया जाना आवश्यक होगा।

पर्याप्त आधार व समाधान होने पर मजिस्ट्रेट आरोपी व्यक्ति को वैयक्तिक हाजिरी से मुक्ति दे सकता है और जरिए अधिवक्ता/प्लीडर हाजिर होने हेतु आदेश दे सकता है।

4–धारा–116–कार्यकारी मजिस्ट्रेट को प्राप्त इत्तिला की सच्चाई के बारें जांच –

इस विषय में दण्ड प्रकिया संहिता में मुख्य प्रावधान निम्नवत् हैं –

(1) जब धारा 111 के अधीन आदेश किसी व्यक्ति को, जो न्यायालय मे उपस्थित है, धारा 112 के अधीन पा दिया गया है अथवा जब कोई व्यक्ति धारा 113 के अधीन जारी किए गए समन या वारण्ट के अनुपालन या निष्पादन मे मजिस्ट्रेट के समक्ष हाजिर है या लाया गया है तब मजिस्ट्रेट उस इत्तिला की सच्चाई के बारे में जांच करने के लिए अग्रसर होगा जिसके आधार पर वह कार्यवाही की गई है और ऐसा अतिरिक्त साक्ष्य ले सकता है जो उसे आवश्यक प्रतीत हो।

(2) ऐसी जांच यथासाध्य, उस रीति से की जाएगी जो समन–मामलों के विचारण और साक्ष्य के अभिलेखन के लिए इसमें इसके पश्चात् विहित है।

(3) उपधारा (1) के अधीन जांच प्रारम्भ होने के पश्चात् और उसकी समाप्ति से पूर्व यदि मजिस्ट्रेट समझता है कि परिशान्ति भंग का या लोक प्रशांति विक्षुब्ध होने का या किसी अपराध के किए जाने का निवारण करने के लिए, या लोक सुरक्षा के लिए तुरन्त उपाय करने आवश्यक हैं, तो वह ऐसे कारणों से, जिन्हें लेखबद्ध किया जाएगा, उस व्यक्ति को, जिसके बारे में धारा 111 के अधीन आदेश दिया गया है, निर्देश दे सकता है कि वह जांच समाप्त होने तक परिशांति कायम रखने और सदाचार बने रहने के लिए प्रतिभुओं सहित या हित बन्ध पत्र निष्पादित कर और जब तक ऐसा बन्धपत्र निष्पादित नहीं कर दिया जाता है, या निष्पादन में व्यतिक्रम होने की दशा मे जब तक जांच समाप्त नही हो जाती है, उसे अभिरक्षा में निरुद्ध रख सकता है,

परन्तु –

(क) किसी ऐसे व्यक्ति को, जिसके विरुद्ध धारा 108, धारा 109 या धारा 110 के अधीन कार्यवाही नहीं की जा रही है, सदाचारी बने रहने के लिए बन्धपत्र निष्पादित करने के लिए निर्देश नही दिया जाएगा,

(ख) ऐसे बन्धपत्र की शर्तें, चाहे वे उसकी रकम के बारे में हो, या प्रतिभु उपलब्ध कराने के या उनकी संख्या के, या उनके दायित्व की धन सम्बन्धी सीमा के बारे में हो, उनसे अधिक दुर्भर न होंगी जो धारा 111 के अधीन आदेश में विनिर्दिष्ट हैं।

इस विषय में निम्नवत् दिशा–निर्देश दिये जाते है –

बिना धारा–111 के तहत प्रांरभिक आदेश निर्गत किए, धारा–116 के तहत जांच तथा धारा–116(3) के तहत पाबन्दी का आदेश नहीं किया जाना चाहिए।

धारा–116 के अधीन की जाने वाली जांच एक पूर्ण न्यायिक जांच है। इस जांच में न्यायिक कार्यवाही की समस्त औपचारिकताओं का अनुपालन किया जाना चाहिए। यथासंभव आरोपित पक्ष के सामने ही साक्ष्य अभिलिखित किया जाना चाहिए तथा गवाहों को विपक्षी से जिरह करने का अवसर दिया जाना चाहिए।

धारा–116(3) मजिस्ट्रेट को इस बात के लिए समर्थ करती है कि वह विपक्षी को जांच पूर्ण होने तक अंतरिम बन्धपत्र (प्रतिभू सहित या प्रतिभू रहित) प्रस्तुत करने की अपेक्षा कर सके, पर यह तभी किया जाना चाहिए जब शांति व्यवस्था कायम रखने हेतु तुरन्त उपाय आवश्यक हो, कार्यवाही करने के कारण अभिलिखित किए गए हों, अंतरिम बन्धपत्र मांगने के पूर्व जांच कर ली गयी हो तथा धारा – 111 में यथोचित प्रारंभिक आदेश पारित कर दिया गया हो।

''तुरन्त उपाय'' से आशयित है कि जब परिशांति भंग होने का, या लोक प्रशांति के विक्षुब्ध होने का या अपराध किए जाने का निवारण करने के लिए या लोक सुरक्षा के लिए तुरन्त उपाय आवश्यक है। यह तब तक लागू होगा जब आरोपी व्यक्ति अभिरक्षा में नही है और बिना बन्धपत्र के स्वतन्त्र रहने पर लोक सुरक्षा इत्यादि के लिए खतरा रहता है।

मजिस्ट्रेट से अपेक्षा है कि धारा–116(3) के तहत आदेश करने से पूर्व धारा–107 की कार्यवाही के लिए दी गयी सूचना की सत्यता के बारे में जांच करे। साथ ही मजिस्ट्रेट को कार्यवाही का न्यायोचित कारण अभिलिखित करना भी अपेक्षित है।

धारा–116(3) के तहत मजिस्ट्रेट को अंतरिम बन्धपत्र दाखिल करने का आदेश अपने न्यायिक मस्तिष्क का प्रयोग कर अपने समाधान को अंकित करते हुए करना चाहिए।

धारा–111 व धारा–116(3) दो पृथक उद्देश्यों के लिए विहित की गई है। अतः मजिस्ट्रेट को धारा–111 व धारा–116(3) के अधीन संयुक्त आदेश नहीं करना चाहिए।

इस धारा के अधीन जॉच, उसके आरंभ होने की तारीख से छः मास की अवधि के अंदर पूरी की जाएगी, लेकिन यदि मजिस्ट्रेट इसके लिए विशेष कारण पाता है तो अपना समाधान अंकित करते हुए इस अवधि में वृद्धि

कर सकता है। यदि ऐसा विशिष्ट आदेश नहीं किया गया है तो छः माह की अवधि के बाद धारा–107 की कार्यवाही स्वतः समाप्त हो जायेगी। एक बार ऐसी जॉच समाप्त होने पर मजिस्ट्रेट को इस कार्यवाही को स्वतः पुनःजीवित ;त्मअपअमद्ध नहीं करना चाहिए।

यदि आरोपी व्यक्ति जॉच लम्बित रहने के दौरान निरूद्ध रखा गया है तो उसके विरूद्ध किसी भी स्थिति में जॉच की अवधि परिसीमा में वृद्धि करने के लिए मजिस्ट्रेट सशक्त नहीं है। ऐसे व्यक्ति के विरूद्ध कार्यवाही 6 माह की अवधि की समाप्ति पर पर्यवसित हो जायेगी।

बन्धपत्र की धनराशि एवं प्रतिभू का वर्ग, प्रकार व संख्या उससे अधिक नहीं हो सकती जितनी धारा–111 के प्रारंभिक आदेश में लिखित है।

5–धारा–117–(गुण–दोष पर बन्धपत्र/प्रतिभूति देने का आदेश) के विषय में प्रावधान एवं दिशा–निर्देश –

यदि गुण–दोष पर सुनवाई/ जॉच से यह साबित हो जाता है कि यथास्थिति परिशांति बनाए रखने के लिए या सदाचार बनाए रखने के लिए यह आवश्यक है कि वह व्यक्ति जिसके बारे में जॉच की गई है, प्रतिभूओं सहित या रहित बन्धपत्र निष्पादित करे तो मजिस्ट्रेट निम्न सावधनियॉ बरतते हुए आदेश जारी करेगा–

किसी व्यक्ति को उस प्रकार से भिन्न प्रकार की या उस धनराशि से अधिक धनराशि की या उस अवधि से दीर्घ अवधि के लिए आदेश नहीं किया जाएगा जो धारा–111 के अधीन दिये गये प्रारंभिंक आदेश में उल्लिखित है। उदाहरणर्थ यदि धारा–111 की नोटिस में प्रतिभूति नहीं मांगी गयी है तो अंतरिम आदेश में भी बन्धपत्र प्रतिभूति सहित निष्पादित करने का आदेश नहीं दिया जा सकता है।

प्रत्येक बन्धपत्र की धनराशि मामले के गुणावगुण व परिस्थितियों का सम्यक ध्यान रखते हुए नियत की जानी चाहिए। इसी प्रकार प्रतिभूति विपक्षी के साधन तथा उसके जीवन स्तर को दृष्टिगत रखते हुए दाखिल करने का आदेश दिया जाना चाहिए।

यदि आरोपी अवयस्क हो तो बन्धपत्र उसके प्रतिभूओं द्वारा निष्पादित किया जाएगा।

6–धारा–118 (आरोपी व्यक्ति के उन्मोचन के विषय में) प्रावधान एवं दिशा–निर्देश–

यदि धारा–116 के अधीन जॉच पर यह साबित नहीं होता है, कि यथास्थिति परिशांति कायम रखने अथवा सदाचार बनाए रखने के लिए आरोपी व्यक्ति बन्धपत्र निष्पादित करे तो मजिस्टेट अभिलेख में इस आशय की प्रविष्टि करते हुए, यदि आरोपी व्यक्ति केवल उस जॉच के प्रयोजनों के ही लिए अभिरक्षा में है तो उसे छोड़ देगा और यदि अभिरक्षा में नहीं है तो उसे उन्मोचित कर देगा।

इस विषय में निम्नवत् मार्गनिर्देश दिये जाते हैं–

इस धारा के अधीन प्रदत्त शक्तियाँ न्यायिक हैं और उनका प्रयोग न्यायिक रूप से ही होना चाहिए अर्थात 118 के अधीन आदेश पारित करने के लिए धारा–111, 112 व 116 में विहित प्रक्रिया का अनुपालन किया जाना तथा गुणावगुण पर पारित अंतिम आदेश में सकारण अभिकथन लिखा जाना आवश्यक है।

मजिस्ट्रेट को पश्चात्वर्ती घटनाओं को संज्ञान में लेने की शक्ति प्राप्त है। यदि अभिलेख पर उपलब्ध सामग्री से दर्शित होता है कि यद्यपि एक समय शांति भंग होने की सम्भावना थी तथापि् पश्चात्वर्ती घटनाओं से शांतिभंग का खतरा समाप्त हो गया है, तो न्यायालय कार्यवाही समाप्त कर सकता है और उन व्यक्तियों को उन्मोचित कर सकता है जिनके विरूद्ध कार्यवाही की गई है।

7– धारा–120–बन्धपत्र की अन्तर्वस्तुएं एवं समपहरण ;वितमिपजनतमद्ध के विषय में प्रावधान एवं दिशा–निर्देश–

आरोपी व्यक्ति द्वारा निष्पादित किया जाने वाला बन्धपत्र उसे, यथास्थिति, परिशांति, कायम रखने या सदाचारी रहने के लिए आबद्ध करेगा और बाद की दशा में कारावास से दण्डनीय को अपराध करना या करने का प्रयत्न या दुष्प्रेरण करना, (चाहे वह कहीं भी किया जाए) बन्धपत्र का भंग है।

उक्त स्थिति में मजिस्ट्रेट को बन्धपत्र समपहृत ;वितमिपजद्ध करने का अधिकार प्राप्त है। ऐसे में मजिस्ट्रेट से निम्न सावधानियाँ अपेक्षित हैं–

परिशांति कायम रखने के लिए बन्धपत्र निष्पादित करने वाले व्यक्ति के विरूद्ध समपहरण की कार्यवाही केवल ऐसे अपराधों को कारित करने से हो सकती है जिसके जिसके परिणाम स्वरूप परिशांति भंग की सम्भावना है।

सदाचारी बना रहने के लिए निष्पादित बन्धपत्र को निष्पादी द्वारा किसी भी अपराध को करने पर समपहृत किया जा सकता है। इसके लिए यह आवश्यक नहीं है कि अपराध ऐसा हो जो परिशांति भंग करने के सम्भाव्य की कोटि में आता हो।

बन्धपत्र के भंग पर समपहरण की कार्यवाही धारा–446 में उल्लिखित प्रावधानों के अनुसार की जायेगी।

यदि किसी व्यक्ति का परिशांति कायम रखने के लिए निष्पादित बन्धपत्र, परिशांति को भंग करने वाले अपराध में दोषसिद्ध होने पर समपहृत होता है तो उसे

बन्धपत्र की शेष अनवसित अवधि के लिए कारागार में नही भेजा जा सकता, उससे केवल समपहृत बन्धपत्र की रकम वसूल की जा सकती है।

बन्धपत्र को समपहृत करने तथा रकम वसूली के आदेश से पूर्व बन्धपत्र के निष्पादी को कारण बताओ नोटिस दिया जाना आवश्यक है।

समपहरण की कार्यवाही प्रधान तथा उसके प्रतिभू, दोनों पर लागू होगी।

8–धारा–121–प्रतिभुओं को अस्वीकार करने की शक्ति–

इस विषय में दण्ड प्रकिया संहिता में मुख्य प्रावधान निम्नवत् हैं–

(1) मजिस्ट्रेट किसी पेश किए गए प्रतिभू को स्वीकार करने से इन्कार कर सकता है या अपने द्वारा, या अपने पूर्ववर्ती द्वारा, इस अध्याय के अधीन पहले स्वीकार किए गए किसी प्रतिभू को इस आधार पर अस्वीकार कर सकता है कि ऐसा प्रतिभू बन्धपत्र के प्रयोजनों के लिए अनुपयुक्त हैः–

परन्तु किसी ऐसे प्रतिभू को इस प्रकार स्वीकार करने से इन्कार करने या उसे अस्वीकार करने के पहले वह प्रतिभू की उपयुक्तता के बारे में या तो स्वयं शपथ पर जॉच करेगा या अपने अधीनस्थ मजिस्ट्रेट से ऐसी जॉच और उसके बारे में रिपोर्ट करवाएगा।

(2) ऐसा मजिस्ट्रेट जॉच करने के पहले प्रतिभू को और ऐसे व्यक्ति को, जिसने वह प्रतिभू पेश किया है, उचित सूचना देगा और जॉच करने में अपने सामने दिए गए साक्ष्य के सार को अभिलिखित करेगा।

(3) यदि मजिस्ट्रेट को अपने समक्ष या उपधारा (1) के अधीन प्रतिनियुक्त मजिस्ट्रेट के समक्ष ऐसे दिए गए साक्ष्य पर और ऐसे मजिस्ट्रेट की रिपोर्ट पर (यदि कोई हो), विचार करने के पश्चात् समाधान हो जाता है कि वह प्रतिभू बन्धपत्र के प्रयोजनों के लिए अनुपयुक्त व्यक्ति है तो वह उस प्रतिभू को, यथास्थिति, स्वीकार करने से इन्कार या उसे अस्वीकार करने का आदेश करेगा और ऐसा करने के लिए अपने कारण अभिलिखित करेगाः–

परन्तु किसी प्रतिभू को, जो पहले स्वीकार किया जा चुका है, अस्वीकार करने का आदेश देने के पहले मजिस्ट्रेट अपना समन या वाारण्ट, जिसे वह ठीक समझे, जारी करेगा और उस व्यक्ति को, जिसके लिए प्रतिभू आबद्ध है, अपने समक्ष हाजिर कराएगा या बुलवाएगा।

इस विषय में निम्नवत् दिशा–निर्देश दिए जाते हैं–

मजिस्ट्रेट धारा–121 के तहत प्रस्तुत प्रतिभूतियों को नामंजूर कर सकता है, किन्तु उसे ऐसा तभी करना चाहिए, जबकि उसने आवश्यक जॉच कर ली हो और नामंजूर करने के अपने कारणों और साक्ष्य को अभिलिखित कर लिया हो।

किसी प्रतिभू को केवल पुलिस रिपोर्ट के आधार पर तथा बिना जॉच किए नामंजूर करना न्यायोचित नहीं है।

प्रतिभू की उपयुक्तता का प्रश्न मजिस्ट्रेट द्वारा न्यायिक जॉच के बाद तय किया जाना चाहिए केवल यह तथ्य कि प्रतिभू अभियुक्त पर पर्याप्त नियंत्रण नहीं रख पायेगा, स्वयं में किसी भूतिभू को अस्वीकृत करने का कारण नहीं होना चाहिए।

बन्धपत्र के प्रयोजन के लिए किसी प्रतिभू की अनुपयुक्तता केवल वित्तीय अनुपयुक्तता तक ही सीमित नहीं होनी चाहिए।

9–धारा–122–प्रतिभूति देने में व्यक्तिक्रम होने पर कारावास–

इस विषय में दण्ड प्रकिया संहिता में मुख्य प्रावधान निम्नवत् हैं–

(1) (क) यदि कोई व्यक्ति, जिसे धारा 106 या 117 के अधीन प्रतिभू देने के लिए आदेश दिया गया है, ऐसी प्रतिभूति उस तारीख को या उस तारीख के पूर्व, जिसको वह अवधि, जिसके लिए ऐसी प्रतिभूति दी जानी है, प्रारम्भ होती है, नहीं देता है, तो वह इसमें इसके पश्चात् ठीक आगे वर्णित दशा के सिवाय कारागार में भेज दिया जाएगा अथवा यदि वह पहले से ही कारागार में है तो वह कारागार में तक तक निरूद्ध रखा जायेगा जब तक ऐसी अवधि समाप्त न हो जाए या जब तक ऐसी अवधि के भीतर वह उस न्यायालय या मजिस्ट्रेट को प्रतिभूति दे दे जिसने उसकी अपेक्षा करने वाला आदेश दिया था।

(ख) यदि किसी व्यक्ति द्वारा धारा 117 के अधीन मजिस्ट्रेट के आदेश के अनुसरण में परिशान्ति बनाए रखने के लिए प्रतिभूओं सहित या रहित बन्धपत्र निष्पादित कर दिए जाने के पश्चात्, उसके बारे में ऐसे मजिस्ट्रेट या उसके पद–उत्तरवर्ती को समाधानप्रद रूप में यह साबित कर दिया जाता है कि उसने बन्धपत्र का भंग किया है तो ऐसा मजिस्ट्रेट या पद–उत्तरवर्ती, ऐसे सबूत के आधारों को लेखबद्ध करने के पश्चात् आदेश कर सकता है कि उस व्यक्ति को गिरफ्तार किया जाए और बन्धपत्र की अवधि की समाप्ति तक कारागार में निरूद्ध रखा जाए तथा ऐसा आदेश ऐसे किसी अन्य दण्ड या समपहरण पर प्रतिकूल प्रभाव नहीं डालेगा जिससे कि उक्त विधि के अनुसार दायित्वाधीन हो।

(2) जब ऐसे व्यक्ति को एक वर्ष से अधिक की अवधि के लिए प्रतिभू देने का आदेश मजिस्ट्रेट द्वारा

दिया गया है, तब यदि ऐसा व्यक्ति यथापूर्वोक्त प्रतिभूति नहीं देता तो वह मजिस्ट्रेट यह निर्देश देते हुए वारण्ट जारी करेगा कि सेंशन न्यायालय का आदेश होने तक, वह व्यक्ति कारागार में निरूद्ध रखा जाए और वह कार्यवाही सुविधानुसार शीघ्र ऐसे न्यायालय के समक्ष रखी जाऐगी।

(3) ऐसा न्यायालय ऐसी कार्यवाही की परीक्षा करने के और उस मजिस्ट्रेट से किसी और इत्तिला या साक्ष्य की, जिसे वह आवश्यक समझे, अपेक्षा करने के पश्चात् और सम्बद्ध व्यक्ति को सुने जाने का उचित अवसर देने के पश्चात् मामले में ऐसे आदेश पारित कर सकता है जो वह ठीक समझे।

परन्तु वह अवधि (यदि कोई हो) जिसके लिए कोई व्यक्ति प्रतिभूति देने में असफल रहने के कारण कारावासित किया जाता है, तीन वर्ष से अधिक की न होगी।

यद्यपि उक्त प्रावधान एवं इसमें उल्लेखित प्रक्रिया सुस्पष्ट है तथापि वर्तमान परिदृश्य में इसे सरलीकृत करते हुए निम्नवत् दिशा निर्देश निर्गत किए जा रहे हैं :–

जब मजिस्ट्रेट आरोपित व्यक्ति को प्रतिभूति दाखिल करने का आदेश देता है तो इसमें निम्न तीन तथ्यों का समावेशन अनिवार्यतः किया जाना चाहिए–

(क) प्रतिभूति की अवधि।

(ख) अवधि के प्रारम्भ होने की तारीख।

(ग) तारीख, जब तक प्रतिभूति दी जानी है।

यदि ऐसे आदेश में अवधि प्रारम्भ होने की तारीख विनिर्दिष्ट नहीं की गयी है तो ऐसी त्रुटि को एक नया आदेश पारित करके सुधारा जा सकता है।

धारा–122 केवल उसी स्थिति में लागू होती है जब अंतिम नियत तारीख तक प्रतिभूति दाखिल नहीं की गयी है। यदि प्रतिभूति दाखिल कर दी गयी है तो यह धारा लागू नहीं होगी।

यदि कोई व्यक्ति, जिसके विरूद्ध कारावास को आदेश दिया गया है, प्रतिभूति दाखिल कर देता तो उसे तुरन्त रिहा कर दिया जाएगा।

धारा–107 के अधीन परिशांति कायम रखने के लिए तथा धारा–108 के अधीन सदाचार के लिए प्रतिभूति देने में असफलता के कारण कारावास सदैव सादा (सश्रम नहीं) होगा, किन्तु जहॉ कार्यवाही धारा–109 या धारा–110 के अधीन की गयी है, वहॉ कारावास प्रत्येक मामले में सम्बन्धित मजिस्ट्रेट या न्यायालय के स्वविवेकानुसार सादा या कठोर होगा। (यद्यपि कठोर कारावास का आदेश देना मजिस्ट्रेट के स्वविवेक पर निर्भर है, किन्तु उसे अपने आदेश में कारण देने चाहिए कि वह कठोर कारावास का आदेश क्यों कर रहा है)

10–धारा–123–(प्रतिभूति देने में असफलता के कारण कारावासित व्यक्तियों को छोड़ने की शक्ति) के विषय में प्रावधान एवं दिशा–निर्देश–

इसके अन्तर्गत धारा 117 के अधीन किसी कार्यपालक मजिस्ट्रेट द्वारा पारित किसी आदेश के मामले में जिला मजिस्ट्रेट या किसी अन्य मामले में मुख्य न्यायिक मजिस्ट्रेट को अधिकार दिया गया है कि वह प्रतिभूति देने में असफल रहने के कारण कारावासित व्यक्ति को उन्मोचित किये जाने या प्रतिभूति की रकम/प्रतिभुओं की संख्या /अवधि को, जिसके लिए प्रतिभूति की अपेक्षा की गयी है, कम किये जाने हेतु आदेश दे सकता है।

यह पूर्णतः मुख्य न्यायिक मजिस्ट्रेट अथवा जिला मजिस्ट्रेट के स्वविवेक पर है कि वह किन परिस्थितियों में इस धारा के अधीन कार्यवाही करे।

11–धारा–124 (बन्धपत्र की शेष अवधि के लिए बन्धपत्र) के विषय में प्रावधान एवं दिशा–निर्देश–

(1) जब वह व्यक्ति, जिसकी हाजिरी के लिए धारा 121 की उपधारा (3) के परन्तुक के अधीन या धारा 123 की उपधारा (10) के अधीन समन या वारण्ट जारी किया गया है, मजिस्ट्रेट या न्यायालय के समक्ष हाजिर होता है या लाया लाता है तब वह मजिस्ट्रेट या न्यायालय ऐसे व्यक्ति द्वारा निष्पादित बन्धपत्र को रद्द कर देगा और उस व्यक्ति को ऐसे बन्धपत्र की अवधि के शेष भाग के लिए उसी भॉति की, जैसी मूल प्रतिभूति थी, नई प्रतिभूति देने के आदेश देगा।

(2) ऐसा प्रत्येक आदेश धारा–120 से धारा–123 तक की धाराओं के (जिसके अन्तर्गत ये दोनों धाराऍ भी हैं।) प्रयोजनों के लिए, यथास्थिति, धारा–106 या धारा–117 के अधीन दिया गया आदेश समझा जाएगा।

12– भारत के संविधान के अनुच्छेद–21 का उल्लंघन करते हुये किसी व्यक्ति की अवैध हिरासत किये जाने के लिए उत्तरदायी अधिकारी के विरूद्ध दण्डात्मक कार्यवाही एवं पीड़ित व्यक्ति को मुआवजे के भुगतान के संबंध में दिशा–निर्देश–

(1) भारत के संविधान **के अनुच्छेद–21 का उल्लंघन करते हुये किसी व्यक्ति की अवैध हिरासत किये जाने के लिए अनुशासनिक प्राधिकारी द्वारा जांच में दोषी पाये जाने पर उत्तरदायी अधिकारी के विरूद्ध उ0प्र0 सरकारी सेवक (अनुशासन एवं अपील) नियमावली, 1999, दि आल इंडिया सर्विसेज (डिसिप्लीन एंड अपील) रूल्स, 1969 एवं उ0प्र0 अधीनस्थ श्रेणी के पुलिस अधिकारियों की (दण्ड और अपील) नियमावली,**

1991 (यथा संशोधित) में संगत नियमों के अंतर्गत दण्डात्मक कार्यवाही की जायेगी।

(2) अनुशासनिक प्राधिकारी द्वारा अपनी **जांच रिपोर्ट 03 माह में अथवा संगत नियमावली में यथा उल्लिखित समयानुसार प्रस्तुत की जायेगी।**

(3) **यदि किसी नागरिक की अवैध रूप से हिरासत प्रमाणित पायी जाती है तो पीड़ित व्यक्ति को रू0–25,000/ की धनराशि का भुगतान मुआवजे के रूप में किया जायेगा।**

इस सम्बन्ध में समस्त जिला मजिस्ट्रेट, उसके अधीनस्थ समस्त कार्यपालक मजिस्ट्रेट्स तथा विशेष कार्यपालक मजिस्ट्रेट्स से यह अपेक्षा की जाती है कि दण्ड प्रक्रिया संहिता में उन्हें प्रदत्त की गयी शक्तियॉं, उनके क्षेत्राधिकार में शांति व्यवस्था एवं लोक प्रशांति बनाये रखने के लिए है। अतः इनका पालन सदैव गुण–दोष के आधार पर युक्तियुक्त न्यायिक मस्तिष्क का प्रयोग करते हुए, विधि एवं निर्धारित प्रक्रिया के अनुसार किया जाए, ताकि आमजन को संविधान से प्राप्त मौलिक अधिकार संरक्षित रहें।

कृपया उक्त दिशा–निर्देशों का सख्ती से अनुपालन सुनिश्चत किया जाए।

18. In the case of **Lucknow Development Authority Vs. M.K. Gupta (1994) 1 SCC 243** (Paras 8, 10, 11 and 12 Hon'ble Supreme Court observed that under our Constitution Sovereignty vest in the people. Every limb of the constitutional machinery is obliged to be people oriented. No functionary in exercise of statutory power can claim immunity, except to the extent protected by the statute itself. Public authorities acting in violation of constitutional or statutory provisions oppressively are accountable for their behaviour before authorities created under the statute like the commission or the courts entrusted with responsibility of maintaining the rule of law.

19. An ordinary citizen or a common man is hardly equipped to match the might of the State or its instrumentalities. The servants of the government are also the servants of the people and the use of their power must always be subordinate to their duty of service. A public functionary if he acts maliciously or oppressively and the exercise of power results in harassment and agony then it is not an exercise of power but its abuse. No law provides protection against it. He who is responsible for it must suffer it. But when it arises due to arbitrary or capricious behaviour then it loses its individual character and assumes social significance. Harassment of a common man by public authorities is socially abhorring and legally impermissible. It may harm him personally but the injury to society is far more grievous. Nothing is more damaging than the feeling of helplessness. An ordinary citizen instead of complaining and fighting succumbs to the pressure of undesirable functioning in offices instead of standing against it. Therefore, the award of compensation for harassment by public authorities not only compensates the individual, satisfies him personally but helps in curing social evil.

20. In a modern society no authority can arrogate to itself the power to act in a manner which is arbitrary. It is unfortunate that matters which require immediate attention linger on and the man in the street is made to run from one end to other with no result. Even in ordinary matters a common man who has neither the political backing nor the financial strength to match the inaction in public oriented departments gets frustrated which erodes the credibility in the system. Where it is found that exercise of discretion was mala fide and the complainant is entitled to compensation for mental and physical harassment then the officer can no more claim to be under protective cover. The test of permissive form of grant is over. It is now imperative and implicit in the exercise of power that it should be for the sake of society. It is the

tax payers' money which is paid for inaction of those who are entrusted under the Act to discharge their duties in accordance with law.

21. Once it is found by the competent authority that a complainant is entitled for compensation for inaction of those who are entrusted under the Act to discharge their duties in accordance with law, then payment of the amount may be made to the complainant from the public fund immediately but it may be recovered from those who are found responsible for such unparadonable behaviour. This legal position is reflected from the law laid down by the Apex Court in **Lucknow Development Authority's case (supra).** In the said case it was further observed by the Apex Court that the Administrative law of accountability of public authorities or their arbitrary and even *ultra vires* actions has taken many strides and it is now accepted both by this Court and English Courts that State is liable to compensate for loss or injury suffered by a citizen due to arbitrary action of its employees.

22. The legal principles as enumerated in foregoing paragraphs Nos. **18, 19, 20 & 21** also finds support of the law laid down by Hon'ble Courts in the case of **Lucknow Development Authority (supra); Jay Laxmi Salt Works (P) Ltd. Vs. State of Gujarat (1994) 4 SCC 1; N. Nagendra Rao & Co. Vs. State of A.P. (1994) 6 SCC 205; State of Maharashtra and others Vs. Kanchanmala Vijaysing Shirke and others (1995) 5 SCC 659; Chief Conservator of Forests and another (1996) 2 SCC 293; S.P. Goel vs Collector Of Stamps, Delhi (1996) 1 SCC 573; Common Cause A. Registered Society Vs. Union of India JT 1999 (5) SC 237: AIR 1999 SC 2979; Shiv Sagar Tiwari Vs. Union of India and others (1996) 6 SCC 558; Chairman, Railway Board and others Vs. Chandrima Das (Mrs.) and others (2000) 2 SCC 465; State of A.P. Vs. Challa Ramkrishna Reddy and others (2000) 5 SCC 712; Research Foundation for Science (10) Vs. Union of India (2005) 13 SCC 659; M.C. Mehta Vs. Union of India and Others (2006) 3 SCC 399; Union of India Vs. Prabhakaran Vijaya Kumar and others (2008) 9 SCC 527; Action Committee, Unaided Private Schools and others Vs. Director of Education, Delhi and others (2009) 10 SCC; Delhi Jal Board Vs. National Campaign for Dignity and Rights of Sewerage and Allied Workers and others (2011) 8 SCC 568; Municipal Corporation of Delhi, Delhi Vs. Uphaar Tragedy Victims Association and others (2011) 14 SCC 481.**

Action by the State Government

23. We record our appreciation for the State Government to take the aforequoted policy decision dated 23.03.2021 for payment of compensation of Rs.25,000/- for illegal detention of any citizen by any Officer of the State Government and initiation of disciplinary proceedings against such officer. Since the State Government itself has taken a policy decision and has paid compensation to the petitioners herein, therefore, no further direction for payment of compensation is required to be issued in the present writ petition.

24. In view of the aforesaid, this writ petition is **disposed of** with the following directions :-

(i) The State Government shall ensure that the provisions of the Cr.P.C. as referred in the policy decision dated

23.03.2021 are strictly followed/observed by all the concerned officers.

(ii) The State Government shall further ensure that paragraph 12 of the policy decision dated 23.03.2021 is strictly implemented, which at the cost of repetition is reproduced below:

(1) भारत के **संविधान के अनुच्छेद–21 का उल्लंघन करते हुये किसी व्यक्ति की अवैध हिरासत किये जाने के लिए अनुशासनिक प्राधिकारी द्वारा जांच में दोषी पाये जाने पर उत्तरदायी अधिकारी के विरूद्ध** उ0प्र0 सरकारी सेवक (अनुशासन एवं अपील) नियमावली, 1999, दि आल इंडिया सर्विसेज (डिसिप्लीन एंड अपील) रूल्स, 1969 एवं उ0प्र0 अधीनस्थ श्रेणी के पुलिस अधिकारियों की (दण्ड और अपील) नियमावली, 1991 (यथा संशोधित) में **संगत नियमों के अंतर्गत दण्डात्मक कार्यवाही की जायेगी।**

(2) अनुशासनिक प्राधिकारी द्वारा अपनी **जांच रिपोर्ट 03 माह में अथवा संगत नियमावली में यथा उल्लिखित समयानुसार प्रस्तुत की जायेगी।**

(3) **यदि किसी नागरिक की अवैध रूप से हिरासत प्रमाणित पायी जाती है तो पीड़ित व्यक्ति को रू0–25,000/ की धनराशि का भुगतान मुआवजे के रूप में किया जायेगा।**

(iii) The State Government shall publish Para 12 of its Policy decision dated 23.03.2021 in all largely circulated National Level Newspaper having circulation in the State of Uttar Pradesh and shall also display it on display board at prominent places within public view, in all blocks, Tehsil Headquarters, Police Stations and in campus of District Collectorate in the whole of the State of Uttar Pradesh.

(iv) Copy of this order shall be sent by the State Government to all District level and Tehsil level Bar Associations in the whole of the State of Uttar Pradesh.

25. Let a copy of this order be sent by the Registrar General of this Court to the Chief Secretary of the State of Uttar Pradesh and the Additional Chief Secretary, Home, for strict compliance.

(2021)06ILR A441
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 06.05.2021

BEFORE

THE HON'BLE ALOK MATHUR, J.

Crl. Revision No. 342 of 2021

Mamta Kumari ...Revisionist
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Revisionist:
Ashish Raman Mishra

Counsel for the Opp. Parties:
Govt. Advocate

Application by Prosecutrix for re-recording her statement rejected-application moved at the stage of final argument-after two and half years-afterthought-no ground of interference.

Held, Undoubtedly, the power to recall any witness is vested in the trial Court and can be exercised at any stage of the trial, but the same has to be done in a reasonable and bona fide manner to meet the ends of justice. It is also to be taken into account that the statement of the prosecutrix during trial was recorded as far back as 2018. **(para 25).**

Revision rejected.(E-8)

List of Cases cited:

1. Jamatraj Kewalji Govani Vs St. of Mah. - AIR 1968 SC 178

2. Mohanlal Shamji Soni Vs U.O.I. & anr., 1991 Suppl.(1) SCC 271

3. Raj Deo Sharma (II) Vs St. of Bihar, 1999 (7) SCC 604,

4. U.T. of Dadra and Nagar Haveli & anr. Vs Fatehsinh Mohanish Chauhan, 2006 (7) SCC 529

5. Iddar & ors. Vs Abida & ors., AIR 2007 SC 3029

6. P. Sanjeeva Rao Vs St. of A.P., AIR 2012 SC 2242

7. Rajaram Prasad Yadav Vs St. of Bihar, (2013) 14 SCC 461

8. State (NCT of Delhi) Vs Shiv Kumar Yadav, (2016) 2 SCC 402

9. Umar Mohammad other's Vs St. of Raj.[2007] 14 SCC 711

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

1. Heard Sri Ashish Raman Mishra, learned counsel for the revisionist as well as learned Additional Government Advocate for the State of U.P. through video conferencing in view of COVID-19 pandemic.

2. The revisionist has assailed the order dated 18.03.2021, passed by the Additional Sessions Judge/Special Judge (POCSO), Bahraich in Special Sessions Case No. 36 of 2016 - State Vs. Ajay Kumar, arising out of Case Crime No. 58 of 2016, under Section 376 of the Indian Penal Code (I.P.C). and Sections 3/4 of the Protection of Children from Sexual Offences Act, 2012 (POCSO), Police Station - Jarwal Road, District - Bahraich, whereby the application preferred by the revisionist/prosecutrix under Section 311 Cr.P.C. for re-recording her statement has been rejected.

3. It has been submitted by the Counsel for the revisionist that a first information report was lodged on 13.01.2016, under Section 376 I.P.C. and Sections 3/4 of POCSO Act against one Ajay Kumar S/o Peshkar, R/o Tapesipah, Police Station - Jarwal Road, District - Bahraich, alleging that the said accused had sexually assaulted the prosecutrix when she had gone to the fields to ease herself in the morning. Investigation was carried out and statements of prosecutrix under Sections 161 and 164 Cr.P.C. were recorded. She reiterated and supported the contents of first information report and after investigation, charge sheet was filed in the Court, pursuant to which the trial commenced against the accused under Sections 376 I.P.C. and Sections 3/4 of POCSO Act. During trial, statement of prosecutrix was also recorded on 19.10.2018, which has been placed on record. The prosecutrix has stated that on the date of occurrence, when she went outside to ease herself in the morning the accused Ajay Kumar dragged her into the fields and committed rape on her, after which she returned to her house and informed her mother of the said incident and subsequently her father informed the Police. After recording the evidence, the trial is at the stage of final arguments, when the prosecutrix moved an application under Section 311 Cr.P.C. before the trial Court seeking permission to recall her as a witness.

4. The trial Court after considering the submissions of learned counsel for the parties has rejected the application u/s 311 Cr.P.C., on the ground that it is a clear attempt by the prosecutrix to delay the trial and now she is making efforts to exonerate the accused for some reasons which have not been disclosed. The prosecutrix not being satisfied by the rejection has approached this Court, and hence this revision.

Q 5. Learned counsel for the revisionist has submitted that the prosecutrix after coming to know that the named accused

Ajay Kumar is not the person who had committed rape upon her, moved an application u/s 311 Cr.P.C. for re-recording her statement so as to bring the truth on record. It was vehemently urged that the trial Court has wrongly and illegally rejected the application of the prosecutrix.

6. Learned Additional Government Advocate has opposed the revision by submitting that inter alia, the prosecutrix is attempting to give an exculpatory statement in favour of the accused so as to exonerate him, for the reasons best known to her, and the application has not been filed in a bona fide manner, and further, there is no explanation for the delay in filing the same. It is also urged that her examination in chief and cross examination has been recorded way back in 2018. In either of the said statements she has not mentioned that she could not identify the accused or that she had wrongly identified the accused. It is submitted that even otherwise, this fact is patently false which would be abundantly clear from a bare perusal of her own statements recorded during investigation and also during the trial, and thereby, he has defended the impugned order and has prayed that the revision is devoid of merits and may be dismissed.

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

8. From the perusal of record as well as impugned order it is clear that statement of prosecutrix was recorded on 19.10.2018 and after nearly two and half years, an application u/s 311 Cr.P.C. has been moved, whereby the prosecutrix herself wanted to bring on record the fact that the accused was not the person who committed rape on her. When asked by the Court from counsel for the revisionist as to what purpose would be served or the reason for delay in moving the application under section 311 Cr.P.C. in light of the fact that the statement of the prosecutrix had been recorded before the trial Court in the year 2018, in the presence of the accused, no explanation was forthcoming.

To examine the validity of the impugned order, as well as examine the scope of the power under section 311 Cr.P.C. before the trial Court, it is necessary to look into the statutory provisions and its interpretation by the Hon'ble Apex Court.

9. Section 311 Cr.P.C. reads as under:-

"311. Power to summon material witness, or examine person present:

Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case"

10. The Supreme Court in the case of **Jamatraj Kewalji Govani Vs. State of Maharashtra -** AIR 1968 SC 178, has held in paragraph 14 that:-

"14. It would appear that in our criminal jurisdiction, statutory law confers a power in absolute terms to be exercised at any stage of the trial to summon a witness or examine one present in court or to recall a witness already examined, and

makes this the duty and obligation of the Court provided the just decision of the case demands it. In other words, where the court exercises the power under the second part, the inquiry cannot be whether the accused has brought anything suddenly or unexpectedly but whether the court is right in thinking that the new evidence is needed by it for a just decision of the case. If the court has acted without the requirements of a just decision, the action is open to criticism but if the court's action is supportable as being in aid of a just decision the action cannot be regarded as exceeding the jurisdiction."

11. In the decision reported in **Mohanlal Shamji Soni vs. Union of India and another, 1991 Suppl.(1) SCC 271**, the Apex Court again highlighted the importance of the power to be exercised under Section 311 Cr.P.C. as under in paragraph 10:-

"10....In order to enable the court to find out the truth and render a just decision, the salutary provisions of Section 540 of the Code (Section 311 of the new Code) are enacted whereunder any court by exercising its discretionary authority at any stage of enquiry, trial or other proceeding can summon any person as a witness or examine any person in attendance though not summoned as a witness or recall or re-examine any person in attendance though not summoned as a witness or recall and re-examine any person already examined who are expected to be able to throw light upon the matter in dispute; because if judgments happen to be rendered on inchoate, inconclusive and speculative presentation of facts, the ends of justice would be defeated."

12. In the decision in **Raj Deo Sharma (II) vs. State of Bihar, 1999 (7) SCC 604**, the proposition has been reiterated by the Apex Court as under in paragraph 9:-

"9. We may observe that the power of the court as envisaged in Section 311 of the Code of Criminal Procedure has not been curtailed by this Court. Neither in the decision of the five-Judge Bench in A.R. Antulay case nor in Kartar Singh case such power has been restricted for achieving speedy trial. In other words, even if the prosecution evidence *is closed in compliance with the directions contained in the main judgment it is still open to the prosecution to invoke the powers of the court under Section 311 of the Code. We make it clear that if evidence of any witness appears to the court to be essential to the just decision of the case it is the duty of the court to summon and examine or recall and re-examine any such person."*

13. In **U.T. of Dadra and Nagar Haveli and Anr. Vs. Fatehsinh Mohanish Chauhan, 2006 (7) SCC 529**, the decision has been further elucidated by the Supreme Court as under in paragraph 15:-

"15. A conspectus of authorities referred to above would show that the principle is well settled that the exercise of power under Section 311 Cr.P.C. should be resorted to only with the object of finding out the truth or obtaining proper proof of such facts which lead to a just and correct decision of the case, this being the primary duty of a criminal court. Calling a witness or re-examining a witness already examined for the purpose of finding out the truth in order to enable the court to arrive at a just decision of the case cannot be dubbed as "filling in a lacuna in the prosecution case" unless the facts and circumstances of the case make it apparent that the exercise of power by the court

would result in causing serious prejudice to the accused resulting in miscarriage of justice."

14. In **Iddar and Others Vs. Abida & Others, AIR 2007 SC 3029**, the object underlying under Section 311 Cr.P.C., has been stated by the Apex Court as under in paragraph 11:-

"11. The object underlying Section 311 of the Code is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The section is not limited only for the benefit of the accused, and it will not be an improper exercise of the powers of the court to summon a witness under the section merely because the evidence supports the case for the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquiries and trials under the Code and empowers Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. In Section 311 the significant expression that occurs is "at any stage of inquiry or trial or other proceeding under this Code'. It is, however, to be borne in mind that whereas the section confers a very wide power on the court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind."

15. In **P. Sanjeeva Rao Vs. State of A.P., AIR 2012 SC 2242**, the scope of Section 311 Cr.P.C. has been highlighted by the Apex Court by making reference to an earlier decision of the Court and also with particular reference to the case, which was dealt with in that decision in paragraphs 13 and 16, which are as under:-

"13. Grant of fairest opportunity to the accused to prove his innocence was the object of every fair trial, observed this Court in Hoffman Andreas Vs. Inspector of Customs, Amritsar, (2000) 10 SCC 430. The following passage is in this regard apposite:

"In such circumstances, if the new counsel thought to have the material witnesses further examined, the Court could adopt latitude and a liberal view in the interest of justice, particularly when the court has unbridled powers in the matter as enshrined in Section 311 of the Code. After all the trial is basically for the prisoners and courts should afford the opportunity to them in the fairest manner possible."

16. Considering all the previous judments, the Supreme Court outlined certain principles for excise of power under section 311 Cr.P.C. in the case of ***Rajaram Prasad Yadav v. State of Bihar, (2013) 14 SCC 461***.

"17. From a conspectus consideration of the above decisions, while dealing with an application under Section 311 Cr.P.C. read along with Section 138 of the Evidence Act, we feel the following principles will have to be borne in mind by the courts:

a) Whether the Court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under Section 311 Cr.P.C. is noted by the Court for a just decision of a case?

b) The exercise of the widest discretionary power under Section 311 Cr.P.C. should ensure that the judgment

should not be rendered on inchoate, inconclusive speculative presentation of facts, as thereby the ends of justice would be defeated.

c) If evidence of any witness appears to the Court to be essential to the just decision of the case, it is the power of the Court to summon and examine or recall and re-examine any such person.

d) The exercise of power under Section 311 Cr.P.C. should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.

e) The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the Court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.

f) The wide discretionary power should be exercised judiciously and not arbitrarily.

g) The Court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.

h) The object of Section 311 Cr.P.C. simultaneously imposes a duty on the Court to determine the truth and to render a just decision.

i) The Court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.

j) Exigency of the situation, fair play and good sense should be the safe guard, while exercising the discretion. The Court should bear in mind that no party in a trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the Court should be magnanimous in permitting such mistakes to be rectified.

k) The Court should be conscious of the position that after all the trial is basically for the prisoners and the Court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The Court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.

l) The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

m) The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.

n) The power under Section 311 Cr.P.C. must therefore, be invoked by the Court only in order to meet the ends of justice for strong and valid reasons and the same must be exercised with care, caution and circumspection. The Court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right."

17. I have given my anxious consideration to the facts as narrated hereinabove. Briefly the facts are that father of the revisionist lodged first

information report against the accused on 13/01/2016 under section 376 IPC and 3/4 of the Protection of Children from Sexual Offences Act, 2012 at Police Station - Jarwal Road, District - Bahraich. Subsequently, investigation was conducted by the police and charge sheet was submitted against be accused, and the trial commenced vide Special Sessions Case No. 36 of 2013. During the trial, the statement of the revisionist was recorded as PW 2 in 2018. It is only after a lapse of nearly 3 years the application was moved by the revisionist for recall of witness along with a prayer for her being examined again.

18. In order to examine the validity and legality of the order passed by the trial court rejecting the application under Section 311 Cr.P.C. preferred by the revisionist we have to advert to the various pronouncements of the Hon'ble Apex Court as referred to herein above where it has been stated that the object underlining Section 311 of the code is that there may not be a failure of justice on account of mistake of either party in bringing valuable evidence on record or leaving ambiguity in the statement of witnesses examined from either side, and on the other hand the exercise of power has to be made on settled principles as enumerated in the case of **Rajaram Prasad Yadav (Supra).**

19. With regard to the scope of an application under Section 311 of the code for recall of the witnesses it has been observed by the Hon'ble Apex Court in the case of **State (NCT of Delhi) v. Shiv Kumar Yadav, (2016) 2 SCC 402 :**

"Certainly recall could be permitted if essential for the just decision but not on such consideration as has been adopted in the present case. Mere observation that recall was necessary "for ensuring fair trial" is not enough unless there are tangible reasons to show how the fair trial suffered without recall. Recall is not a matter of course and the discretion given to the court has to be exercised judiciously to prevent failure of justice and not arbitrarily. While the party is even permitted to correct its bona fide error and may be entitled to further opportunity even when such opportunity may be sought without any fault on the part of the opposite party, plea for recall for advancing justice has to be bona fide and has to be balanced carefully with the other relevant considerations including uncalled for hardship to the witnesses and uncalled for delay in the trial. Having regard to these considerations, we do not find any ground to justify the recall of witnesses already examined."

20. The precipice of the abovementioned Judgments is that the primary object of the application under section 311 Cr.P.C. is to ensure a fair trial and any evidence which may be brought on record should in fact be taken on record so as to prevent any failure of justice, but on the other hand such an application has to be filed in bona fide manner for advancement of securing a fair trial and even extends to correct any bona fide error.

21. Adjudicating a similar controversy the Hon'ble Supreme Court in the case of **Umar Mohammad other's v state of Rajasthan [2007] 14 SCC 711**, upheld the rejection of the application under Section 311 of the code where the same was filed after 9 months of the deposition of the prosecutrix and after 4 years of the incident and it was observed that the delay was itself of pointer to the fact that the victim had been won over. It

was further observed that "it is absurd to content that he, after a period of 4 years and that too after his examination in chief and cross examination was completed, would file in application on his own will and volition. The Supreme Court upheld the order of trial court and observed "application was, therefore rightly dismissed".

22. The reason disclosed by the revisionist for filing the application under section 311 Cr.P.C. enumerated in paragraph no. 7 of the revision is that the revisionist was under the impression that the named accused is the person who had committed rape, but after recording her evidence when she saw the named accused during the trial, she realised that the named accused is not the person who has committed rape on her, and therefore prayed that she be recalled as witness so that she, by fresh statement, could bring on record this fact.

23. It is for the aforesaid reason that the revisionist moved an application under section 311 of the Cr.P.C. for recalling her as a witness and re-recording her statement.

24. The trial court has rejected the application under section 311 of the crpc after observing that the stage of evidence is over and the matter is fixed for final arguments. Further, it has been considered that the statement of the prosecutrix had already been recorded as PW 2 and the statement of the accused has also been recorded as per Section 313 of the Cr.P.C. where he has not denied his identity as being Ajay Kumar. It has also been observed that in case there was a dispute regarding identity of the accused, an application should have been moved on behalf of the accused rather than the prosecutrix, and for these reasons the application was rejected.

25. In the present case, the application u/s 311 Cr.P.C. has been filed after a considerable delay of more than two and a half years which has not been explained which leads us to an irresistible conclusion that the same is an afterthought and has not been filed in a bona-fide manner, and further, it is an attempt for some reason, which seems to be questionable, seeks to materially dispute the identity of the accused, and thereby completely alter the very basis of the prosecution, of which the revisionist herself is the author. Undoubtedly, the power to recall any witness is vested in the trial Court and can be exercised at any stage of the trial, but the same has to be done in a reasonable and bona fide manner to meet the ends of justice. It is also to be taken into account that the statement of the prosecutrix during trial was recorded as far back as 2018.

26. According to the provisions of section 273 Cr.P.C. the evidence during a trial has to be recorded in presence of the accused, and therefore in 2018 when the examination in chief was recorded, the same must have been done in the presence of the accused, and there is no denial of the same in either the application moved before the trial Court or before this Court. It is therefore safe to presume that the Examination in chief was recorded in presence of the accused, and therefore undisputedly, the revisionist had ample opportunity to identify or question the identity of the accused who was present in court. No dispute about the identity of the accused was raised before the trial Court or within any reasonable time subsequently. No credible or convincing explanation is forthcoming for not raising the dispute

regarding identity of the accused at that stage. On the contrary a perusal of statement of revisionist during trial, the following facts emerge, which unequivocally point out that the revisionist was aware of the identity of the accused:-

A. A perusal of the statement of the prosecutrix would indicate that she has categorically named the accused who sexually assaulted her.

B. During cross examination she has stated that previously she did not know the accused but she saw him when she appeared before the trial court for her deposition.

C. During cross examination she stated that she had identified the accused in the police station where she came to know about the name of the accused.

D. During cross examination it has again been stated by the prosecutrix that the accused had accosted her in the morning of the date of incident when she had gone to ease herself in the fields, from behind the accused had put a muffler around her face so that she could not shout for help.

27. The application under section 311 CrPC filed by the revisionist, on the face of it defeats the very purpose for which it has been moved. It does not in any manner advance the ends of Justice or the case of the prosecution but defeats and sets to naught the entire proceedings conducted till date. The identity of the accused is one of the most salient and crucial aspect to be determined by the trial Court when the same is questioned by the accused. In the present case the identity of the accused is sought to be questioned by the prosecutrix herself, rather than by the accused, which is rather unusual. It cannot be ruled out that the said application has been moved at the behest of the accused and that the prosecutrix has been won over for some undisclosed consideration or threat.

28. A perusal of application u/s 311 Cr.P.C. clearly indicates that same is highly belated and has not been filed to secure the ends of justice. Statement of prosecutrix as well as the statement of accused u/s 313 Cr.P.C. have been recorded, and trial is at its fag end and there is no cogent explanation for delay in filing the application at such a belated stage.

29. In light of the above facts, it is clear that the application under section 311 Cr.P.C. has not been moved in a bona fide manner by the revisionist to secure the ends of Justice. It does not seek to fulfill some lacunae which may have been inadvertently left out during the examination in chief of the prosecutrix. From a bare perusal of her statement and cross examination, it is clearly borne out that she did not doubt the identity of the accused who would have been present in Court. She herself has stated during her cross examination that in the Police Station she had met the accused and was informed about his name. Thus, all along she was aware of the identity of the accused till she chose to file the application under section 311 Cr.P.C. After duly considering the facts of the case, the plea set forth by the revisionist does not inspire any confidence and is clearly not supported by the facts on record.

30. The Courts have a duty to examine the attenuating circumstances, and the reasons set forth in the application for recalling any witness. In case, there is a bona fide mistake, or any fact has been unintentionally left out from the testimony, or discovery of new fact which was not earlier in the knowledge of the witness, are some of the grounds available for which the

power under section 311 Cr.P.C. may be exercised for the recall of a witness. But simultaneously, on the other hand, it has to be mentioned that the application has to be moved expeditiously, so that the trial proceedings do not get procrastinated to the disadvantage of the accused, who undoubtly has a right of speedy trial. We would hasten to add that in case the said application has been filed with delay, the same is not liable to be rejected on this score alone, but it would be imperative to explain the delay to the satisfaction of the Court. In the present case, neither has the delay been explained, and also this Court is of considered opinion that the same has not been filed in a bona fide manner and therefore no ground for interference is made out with the impugned rejection order.

31. In light of the above I do not find any infirmity with the order of the trial court, and even otherwise considering the facts of the case there is no ground to interfere with the impugned order.

32. The revision lacks merit and accordingly **rejected.**

33. The trial Court is directed to conclude the trial expeditiously. Let a copy of this order be sent to the Court concerned.

(2021)06ILR A450
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.05.2021

BEFORE

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

Habeas Corpus Writ Petition No. 451 of 2020

Manish Kumar & Anr. ...Petitioners

Versus

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

Counsel for the Petitioner:
Sri Satyawan Yadav, Sri Ranjeet Yadav, Sri Anand Kumar Srivastava

Counsel for the Respondents:
G.A., Sri Ashutosh Yadav, Sri Sudhanshu Kumar, Sri Rajeev Lochan Shukla A.C.

Corpus minor -married out of his free will-to a major girl-Petition filed by his mother-illegal detention by wife-marriage voidable-major wife cannot be entrusted with the custody of minor husband-Corpus send to Safe Home until he attains the age of 18 years-thereafter be set free to go wherever he wants.

W.P. allowed. (E-8)

List of Cases cited:

1. T. Sivakumar Vs Inspector of Police of Theravallur, AIR 2012 Mad. 62

2. Court on its own motion (Lajja Devi) & ors. Vs St.& ors., 2013 CrLJ 3458

3. Independent Thought Vs U.O.I. & anr., (2017) 10 SCC 800

4.Akbar & anr. Vs St. of U.P.& ors., 2008 (2) ADJ 98

5. Special Leave to Appeal (Crl.) No.2664 of 2008

6. Shahnaz Begum Vs St. of U.P. & ors., decided on 23.02.2016.

7. Gaurav Nagpal Vs Sumedha Nagpal, (2009) 1 SCC 42

8. Albert G. Smith Vs Walter W. Seibly, 72 Wn.2d 16 (1967) 431 P.2d 719

9. Tejaswini Gaud & ors. Vs Shekhar Jagdish Prasad Tewari & ors., (2019) 7 SCC 42

10. Ramesh Tukaram Gadhwe & ors. Vs Sumanbai Wamanrao Gondkar & anr., 2007 SCC OnLine Bom 975

11. Githa Hariharan (Ms.) & anr. Vs R.B.I. & anr., (1999) 2 SCC 228

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

The facts giving rise to this Habeas Corpus Writ Petition are rather unconventional and not commonplace; or so it seems.

2. Manish Kumar is a youth, aged about 16 years and a half. He has married Jyoti, as he says, of his freewill. Jyoti is a major and an adult in the cognizance of law, just above the age of 18 years. Pramila Devi is Jyoti's mother and Manish Kumar's mother-in-law. Arjun and Bheem are Jyoti's brothers and Pramila Devi's sons. Manish Kumar, after his marriage to Jyoti, was staying with his wife, his mother-in-law and his two brothers-in-law, Arjun and Bheem. Haushila Devi is Manish Kumar's mother. She appears to have thought that Jyoti, her mother Pramila Devi and her brothers, Arjun and Bheem have enticed away her minor son and forced him into a marriage of sorts, which is illegal for want of the minor's competence under the law. She has gone on to say that Manish Kumar, her minor son, is illegally detained by Pramila Devi, Arjun, Bheem and Jyoti, arrayed as respondent nos. 5, 6, 7 and 8 in that order. In keeping with her thought and word, Haushila Devi has effectively instituted the present Habeas Corpus Writ Petition, arraying Manish Kumar as the first petitioner and herself as the second, asking this Court to order Manish Kumar, her minor son, to be produced on a Rule Nisi before this Court and upon production, set at liberty in the manner that Manish Kumar be entrusted to her care and custody.

3. Upon the petition coming up before this Court on 18.09.2020, it was admitted to hearing, and a Rule Nisi was issued, ordering the production of Manish Kumar, said to be in the illegal confinement of respondent nos. 5 to 8. The Rule was made returnable on 23.09.2020. On the date of return, Manish Kumar was produced before this Court, and what he said before us about the nature and character of his association with respondent nos. 5, 6, 7 and 8 spares no doubt that Manish Kumar was never under any kind of coercion to stay with Jyoti or the other respondents, who are claimed to be illegally detaining him. He also does not appear to have been enticed away. This conclusion on facts can best be fathomed by what he stated before the Court in answer to questions that were put to him. His stand recorded in the Court's order on 23.09.2020 is extracted below:

Q.1. Aapka naam kya hai?
Ans. Manish Kumar

Q.2. Aapke pitaji ka kya naam hai?
Ans. Paras Nath

Q.3. Aapki aayu kya hai?
Ans. 16 Saal

Q.4. Aap kaha se aaye hain?
Ans. Chauki Narshinghpur

Q.5. Aap waha kiske pas rahte hain?
Ans. Apni Sas ke pas

Q.6. Aapki sas ka kya naam hai?
Ans. Pramila

Q.7. Jyoti kaun hai?
Ans. Hamari Aurat

Q.8. Aap apni marji se rahte hain Pramila aur Jyoti ke pas?
Ans. Ji Sir

Q.9. Haushila Devi kaun hai?

Ans. Hamari maa hai

Q.10. Aap apni maa ke pas jana chahte hain?

Ans. Nahi

Q.11. Kaha jana chahte hain?

Ans. Sas aur Aurat ke pas

4. Upon the Court asking Mr. Anand Kumar Srivastava, learned Counsel for the petitioners, about Haushila Devi's stand in the matter, he insisted that Manish was a minor and did not have the legal competence to marry Jyoti. He said that their marriage is void, in view of the provisions of The Hindu Marriage Act, 19551 and The Prohibition of Child Marriage Act, 20062. It was contended by Mr. Srivastava that Manish being a minor, cannot exercise his choice to stay with strangers like respondent nos. 5 and 8, and that Haushila Devi, being his mother and natural guardian, is entitled to ask this Court, in the interest of the minor's welfare, to restore him to her custody.

5. In view of the stand of parties, and the way the law would tentatively bear upon their conflicting rights and claims, this Court formulated the following questions for consideration, again vide order dated 23.09.2020 :

"1. Whether the marriage of a minor in contravention of the Hindu Marriage Act and Section 14 of the Prohibition of Child Marriage Act, 2006 is void ab initio?

2. Whether a minor who does not want to stay with his parents, is entitled to stay with a person of his choice, particularly, where he is on the verge of attaining majority and in the age group of expressing his intelligent choice?

3. Whether a minor who decides to stay away from his parents or natural guardian with a stranger of his/her choice can be compelled by the natural guardian to be restored to his custody, particularly, through a writ of habeas corpus?

4. Whether a minor can be permitted to live with an utter stranger other than a natural guardian, if the welfare of the minor is better ensured to the Court's satisfaction in the hands of the utter stranger?"

6. This Court being mindful of the fact that the minor was not inclined to go along with his mother, Haushila Devi, on the one hand, and on the other, she seriously objected to her minor child being in the custody of utter strangers, as she has chosen to characterize it, this Court directed that in the meanwhile, Manish Kumar and Jyoti, both be housed in a State facility, other than a Child Reform Home or Nari Niketan. The matter was directed to come up again on 24.09.2020. On 24th September, the Court found that Manish's wife and mother-in-law wanted to stiffly contest the proceedings, but did not have legal counsel to represent them. On an inquiry being made by the Court, both Pramila Devi and Jyoti disclosed their inability to secure the services of a legal counsel. In those circumstances, the Court appointed Mr. Sudhanshu Kumar, Advocate, from the Panel of learned Counsel maintained by the High Court Legal Services Committee, High Court, Allahabad to represent each of the respondent nos. 5 and 8, in the cause. At the same time, this Court felt the need for assistance of an amicus curiae, looking to complexities of the issues involved. Accordingly, Mr. Rajeev Lochan Shukla, Advocate was requested to assist the Court as amicus curiae.

7. It must also be placed on record that Manish Kumar, during hearing and pending judgment, continues to be housed in a State facility, looking to the stand of parties, including his own stand. Respondent no. 5, who too was initially required to be housed in a State facility, has gone back home, as the Court did not pass any further orders requiring her to be housed after 24.09.2020. The order requiring respondent no. 5 to stay in a State facility was made on 23.09.2020, as she was reported to be in the family way. On the following day, as it was clarified that she would be looked after well by her mother, respondent no. 8, no further orders regarding housing her were made and she went back home.

8. On 30.09.2020, when the matter was again taken up, at the intervention of Mr. Shukla, the learned Amicus Curiae and by agreement of all parties, Question No. 1, formulated on 23.09.2020, was modified and rephrased in the following terms :

"Whether the marriage of a minor in contravention of Section 5 of the Hindu Marriage Act, 1955 and Sections 3(1) and 12 of the Prohibition of Child Marriage Act, 2006 is void ab initio?"

9. A further question was framed at the instance of Mr. Sudhanshu Kumar, learned Counsel appearing for respondent nos. 5 and 8, by consent of all parties, including the learned Amicus Curiae, which reads :

"Whether a wife who is a major can be entrusted with the custody of a husband who is a minor, where the marriage is voidable?"

10. Hearing commenced on 07.10.2020, with Mr. Anand Kumar Srivastava, learned Counsel for the petitioners, Mr. Sudhanshu Kumar, learned Counsel appearing on behalf of respondent nos. 5 and 8, Mr. Indrajeet Singh, learned Additional Government Advocate appearing on behalf of the State and Mr. Rajeev Lochan Shukla, Advocate appearing as the Amicus Curiae addressing the Court. Mr. Ashutosh Yadav, Advocate, was also requested to act as amicus curiae in the matter, and he too, addressed the Court.

11. The Court proposes to examine and answer the questions formulated as pure propositions of law and then examine the way answers to those questions bear on the facts of the case.

QUESTION NO. 1

12. Section 5 of the HMA stipulates conditions that ought to be fulfilled in order to solemnize a marriage between two Hindus. Section 11 of the HMA spells out what kind of marriages would be void, whereas Section 12 details those marriages that would be voidable, and also limitations on the right of a party to seek annulment of a marriage, claimed to be voidable. Much of those statutory provisions are not relevant to the issue in hand, for those deal with many a different contingency, besides the one of concern here. A reading of Section 5 (iii) of the HMA would show that one of the conditions to be fulfilled for a marriage to be solemnized between two Hindus is that the bridegroom should have completed the age of 21 years, and the bride, the age of 18 years at the time of marriage. Section 11 of the HMA makes marriages held in contravention of clauses (i), (iv) and (v) of Section 5 void, but not marriages held in violation of clause (iii) of Section 5. Sub-section (1) of Section 12, spells out contingencies, where a Hindu marriage may be annulled by a decree of nullity. Clauses (a) to (d) of sub-section (1)

of Section 12 enumerate those grounds that afford a cause of action to the party aggrieved to seek annulment. Clause (b) of sub-section (1) of Section 12 specifies clause (ii) of Section 5 as one carrying a condition, the contravention whereof would render a marriage voidable on a petition for a decree of nullity. A plain reading of Sections 5, 11 and 12 of the HMA do not indicate the consequences that would attach to a marriage solemnized in breach of Section 5 (iii). However, Section 18 (a) of the HMA provides that a person who "procures a marriage for himself or herself to be solemnized under this Act in contravention of the conditions specified in clause (iii), ... of Section 5" becomes liable to rigorous imprisonment that may extend to two years, with or without fine, the fine imposable being a maximum of Rs. One lakh. It is on the terms of these statutory provisions that Mr. Srivastava, learned Counsel for the petitioners and Mr. Shukla and Mr. Yadav, the two learned Amicus Curiae appearing in the matter, have urged that the marriage would not be void under Section 5 (iii) of the HMA, though all of them say that it would be either void or voidable, depending on the circumstances attending the marriage, under Sections 3(1) and 12 of the PCMA.

13. Broadly in agreement with the learned Counsel for the petitioners vis-à-vis the effect of a breach of Section 5 (iii) of the HMA and the validity of the Hindu marriage, Mr. Sudhanshu Kumar, learned Counsel appearing on behalf of respondent nos. 5 and 8, submits that the legislature has not provided for any consequence about a marriage solemnized in breach of Section 5 (iii) regarding its validity; the marriage would neither be void nor voidable. It would be valid, albeit inviting punishment for the party, who is a major. He says that if both be minors, their guardians, with whose consent the marriage has been solemnized, would be liable for the offence. He goes on to say that if the two minors are runaways from home and have married of their own, the liability would be upon those who could have prevented the marriage, but did not take reasonable steps to do so. Nevertheless, Mr. Sudhanshu Kumar submits that whatever be the penal consequences of a marriage solemnized in breach of Section 5 (iii) of the HMA under Section 18, the scheme of the Act considered wholesomely, cannot lead one to the conclusion that a breach of the clause under reference would render the marriage either void or voidable; the marriage would be valid. However, Mr. Kumar submits that in order to render a marriage void under Section 12 of the PCMA, the conditions stipulated under clauses (a), (b) and (c) of Section 12 would have to be strictly established by the person who impugns the marriage; else the marriage would be voidable at the option of the party, who was a child at the time of marriage. He submits that if they happen to be children, the marriage would be voidable at the instance of either of them. The right to action, the limitation for the purpose would all be governed by the special rules in sub-section (2) and (3) of Section 12.

14. Mr. Indrajeet Singh, learned A.G.A. appearing for the State, however, submits that the marriage would be void. He says that Section 5 (iii) of the HMA is clear in that, that it stipulates as a condition precedent to the solemnization of a Hindu marriage, the statutory minimum age for prospective spouses, differentially prescribed according to their sex. He urges that the legislative prescription about a valid Hindu marriage vis-à-vis age of the parties

postulated under Section 5 (iii) cannot be construed in a manner that it becomes a source of its own nullification. It is Mr. Singh's submission that the prohibition vis-à-vis age of the parties to a Hindu marriage is cast in clear and absolute terms, under Section 5 (iii). The fact that Section 18 (a) of the PCMA makes a contravention of clause (iii) of Section 5 an offence that invites rigorous imprisonment and fine, makes the legislative intent clear that a marriage in violation thereof would be void. He has drawn the Court's attention to Section 4 of the Act, which gives it overriding effect over any text, rule or interpretation of the Hindu law, or any custom or usage to the contrary, as also any other law in force, immediately before the commencement of the HMA. It is the learned A.G.A.'s emphatic submission that even if marriages by any custom or usage, earlier prevalent amongst Hindus be valid, notwithstanding the age of the spouses at the time of solemnization, the Act unequivocally renders a marriage void between two Hindus, who do not fulfill the statutory minimum requirement of age on the date of marriage. He elucidates his submission by a reference to Section 5 (v) of the HMA to point out that the prohibition there about a marriage between Sapinda is qualified by a custom or usage governing each of them, if that permits a marriage between the two. Likewise, he submits that the prohibition in clause (iv) of Section 5 is also qualified by the existence of a custom or usage to the contrary, permitting a marriage within degrees of prohibited relationship. The learned A.G.A. submits that by contrast, the prohibition under clause (iii) of Section 5 is absolute and admits of no qualification. Therefore, in the submission of Mr. Indrajeet Singh, a marriage solemnized in contravention of Section 5 (iii) is no marriage under the law and has to be ignored; in short, it is void.

15. As regards differential treatment to the validity of a marriage between minors, if the conditions mentioned under Section 12 of the PCMA exist and if they do not, according to the learned A.G.A., would make little difference for an answer to the question involved here. He urges that the PCMA is a Statute of universal application to all persons within the territory of India and to the citizens of India beyond the Indian shores, irrespective of religion, whereas the HMA is applicable to a Hindu, as defined under Section 2, whether resident in India or domiciled in territories to which the HMA extends, but are outside those territories. He submits that if a marriage is void under Section 5 of the HMA for the violation of clause (iii) thereof, Sections 12 and 3 (1) of the PCMA would not, at all, come into play. He further says that since a marriage in contravention of Section 5 (iii) of the HMA is void in the case of two Hindus, Sections 12 and 3 (1) of the PCMA would not, at all, be attracted.

16. This Court has considered the submissions advanced by learned Counsel for parties, as well as the learned Amicus Curiae appearing in the matter. No doubt, the provisions of Section 5 of the HMA spell out conditions, subject to which, a marriage may be solemnized between two Hindus, but the provisions under Sections 4, 5, 11, 12 and 18 have to be read as an integrated whole, in order to find out the conditions, subject to which, marriage between two Hindus may be solemnized, and if solemnized in breach of one or the other or more than one of the conditions laid down by the Statute, the consequences that would attach to the validity of that marriage. So far as the HMA is concerned, the scheme of the Statute across Sections 4, 5, 11, 12 and 18 is unambiguous in that, that while it requires the age of 18 years for

a woman and 21 years for a man to be a condition precedent for a valid marriage between two Hindus, the consequences of violation of one or the other clauses of Section 5 of the HMA stipulated under Sections 11 and 12 do not provide for the violation of Clause (iii), that is to say, the condition regarding minimum age for a valid Hindu marriage. This conscious omission about consequence of a violation of the minimum age clause on the validity of a Hindu marriage is no casus omissus. The legislature, after providing for the consequences of a violation of the conditions specified in Clauses (i), (iv) and (v) of Section 5 under Section 11, is conspicuously silent about the contingency of a breach of Clause (iii). The legislature has provided for penal consequences under Section 18 (a) of the HMA, where a term imprisonment or fine or both are provided; but the validity of a Hindu marriage solemnized in breach of Section 5(iii) has been left intact by the HMA. So far as Section 5(iii) of the HMA is concerned, read in the context of that statute, there is good authority and for good reason to hold that a Hindu marriage, solemnized in violation of Section 5(iii) is neither void nor voidable. There are pertinent remarks to that effect, to be found in the decision of a Full Bench of Madras High Court in T. Sivakumar v. Inspector of Police of Theravallur3 where it has been held :

"14. A close reading of these two provisions would go to show that a marriage solemnized in violation of sub-section (iii) of Section 5 of the Hindu Marriage Act has not been declared either as void or voidable. The marriage which falls within the ambit of Section 11 has been held to be void from its very inception [vide Yamunabai Anantrao Adhav v. Anantrao Shivram Adhav, AIR 1988 SC 644]. So far as a voidable marriage as provided in Section 12 of the Act is concerned, the said marriage may be annulled by a decree of nullity on any one or more of the grounds enumerated thereunder. Since the Hindu Marriage Act as well as the Child Marriage Restraint Act do not declare a marriage of a minor either as void or voidable, such a child marriage was treated all along as valid. There were number of judicial pronouncements to this effect. In this legal scenario, the Hindu Minority and Guardianship Act also provided that the husband of a minor wife is her natural guardian."

(Emphasis by Court)

17. This position of law has not been in doubt. So long as the Child Marriage Restraint Act, 19294 was in force, a repealed statute that applied to all citizens and a fortiori to Hindu marriages too, it did not make much difference to the validity of a Hindu marriage solemnized in breach of Section 5(iii), or so to speak, the corresponding provision about minimum age under the CMRA. This was so because the CMRA did not take the legislative effort to abolish child marriages beyond making the transgression about the statutory minimum age a punishable offence. It did not make the marriage void or voidable. The position, however, has changed much after enactment of the PCMA, by making the marriage voidable at the option of the party who was a child at the time of the marriage and also void under the three specified contingencies postulated under Section 12. Here, the provision of Sections 3 and 12 of the PCMA may be quoted with profit :

"3. **Child marriages to be voidable at the option of contracting party being a child.--(**1) Every child marriage, whether

solemnised before or after the commencement of this Act, shall be voidable at the option of the contracting party who was a child at the time of the marriage:

Provided that a petition for annulling a child marriage by a decree of nullity may be filed in the district court only by a contracting party to the marriage who was a child at the time of the marriage.

(2) If at the time of filing a petition, the petitioner is a minor, the petition may be filed through his or her guardian or next friend along with the Child Marriage Prohibition Officer.

(3) The petition under this section may be filed at any time but before the child filing the petition completes two years of attaining majority.

(4) While granting a decree of nullity under this section, the district court shall make an order directing both the parties to the marriage and their parents or their guardians to return to the other party, his or her parents or guardian, as the case may be, the money, valuables, ornaments and other gifts received on the occasion of the marriage by them from the other side, or an amount equal to the value of such valuables, ornaments, other gifts and money:

Provided that no order under this section shall be passed unless the concerned parties have been given notices to appear before the district court and show cause why such order should not be passed.

12. **Marriage of a minor child to be void in certain circumstances**.--Where a child, being a minor-- (a) is taken or enticed out of the keeping of the lawful guardian; or

(b) by force compelled, or by any deceitful means induced to go from any place; or

(c) is sold for the purpose of marriage; and made to go through a form of marriage or if the minor is married after which the minor is sold or trafficked or used for immoral purposes,

such marriage shall be null and void."

18. The Full Bench of the Madras High Court in **T. Sivakumar (supra)** considered a very pertinent question, which shares its substance with Question No. 1 here (as reformulated) and somewhat with the content of Question Nos. 3 and 4 (apart from the substance of Question Nos. 3 and 4 here being subject matter of consideration vide Question No. 4 in **T. Sivakumar**). For the present, however, the Court is concerned with the holding of their Lordships of the Full Bench in **T. Sivakumar** on the first part of Question No. 1 formulated there. Question No. 1 in **T. Sivakumar** reads :

"(1) Whether a marriage contracted by a person with a female of less than 18 years could be said to be valid marriage and the custody of the said girl be given to the husband [if he is not in custody]?"

19. In answering the first part of the question before the Full Bench, their Lordships, after a searching comparison and examination of the provisions of CMRA, PCMA and HMA held :

"26. But, in Saravanand's Case cited supra, the Division Bench has held that such a marriage between a boy aged more than 21 years and a girl aged less than 18 years is not voidable. In other words, according to the Division Bench such a child marriage celebrated in contravention of the Prohibition of Child Marriage Act is a valid marriage. With respect, we are of the opinion that it is not a correct interpretation. A plain reading of Section 3 of the Prohibition of Child Marriage Act would make it clear that such child

marriage is only voidable. Therefore, we hold that though such a voidable marriage subsists and though some rights and liabilities emanate out of the same, until it is either accepted expressly or impliedly by the child after attaining the eligible age or annulled by a Court of law, such voidable marriage, cannot be either stated to be or equated to a "valid marriage" stricto sensu as per the classification referred to above. Accordingly, we answer the first part of the 1st question referred to above."

20. This issue again came up before a Full Bench of the Delhi High Court in **Court on its own motion (Lajja Devi) and others v. State and others**5. In the aforesaid case, the Full Bench took up some four matters arising through varied kind of legal proceedings, but involving one common fact that in each case, the woman was below 18 years and had married a man above 21 years of age of her free consent. The Division Bench referred some five questions, disagreeing with three earlier Division Bench decisions that had taken the view that the marriage of a minor girl was neither void nor voidable under the HMA. All the various questions referred to the Full Bench may be relevant to one or the other question under consideration here, as is the case with the Madras High Court Full Bench in **T. Sivakumar**. Now, so far as the present question is concerned, it is the first part of the first question referred to the Full Bench of the Delhi High Court that is relevant. It must also be said that the question referred here bears remarkable resemblance in substance to Question No. 1 that was the subject matter of reference before the Full Bench of the Madras High Court in T. Sivakumar. The first question referred to the Full Bench of the Delhi High Court in Lajja Devi (supra) reads :

"1) Whether a marriage contracted by a boy with a female of less than 18 years and a male of less than 21 year could be said to be valid marriage and the custody of the said girl be given to the husband (if he is not in custody)?"

21. In answering the question, the Full Bench of the Delhi High Court, speaking through A.K. Sikri, A.C.J. (as His Lordship then was of the High Court) held :

"31. We have already reproduced Sections 2(a), 9, 12 and 15 of this Act. It is clear therefrom that marriage of a minor child is treated as void only under the circumstances mentioned in Section 12. Otherwise, this Act does not make the marriage of the child void but voidable at the option of the parties to an underage marriage which option can be exercised within the stipulated time. It is intriguing that the legislature accepted the menace of child marriage. It even accepted that the child marriage is violation of human rights. The legislature even made the child marriage a punishable offence by incorporating provision for prosecution and imprisonment of certain persons. At the same time, except in certain circumstances contemplating under Section 12 of the Act, the marriage is treated as voidable. The interplay of this Act with other enactments compounds this anomaly and comments on such anomalies are stated in detail at the appropriate stage. At present we confine ourselves to the issue at hand as the status of the child marriage needs to be determined on the basis of statutory provisions, which exists as of now. As pointed out above, under the Hindu Marriage Act, child marriage is still treated as valid and not a void marriage. It is personal law, in codified form, governing Hindus. On the other hand, PCM Act, which is a secular law, treats this marriage as voidable except those events which are

covered by Section 12 of the PCM Act. In neither of the aforesaid statutes the child marriage is treated as void ab initio or nullity. Therefore, we cannot hold child marriage as a nullity or void. The next question that follows is as to whether the provisions of personal law, i.e., Hindu Marriage Act should be applied to declare such a marriage as valid or the provisions of PCM Act would prevail over the HM Act.

32. It is distressing to note that the Penal Code, 1860 acquiesces child marriage. The exception to Section 375 specifically lays down that sexual intercourse of man with his own wife, the wife not being under fifteen years of age is not rape, thus ruling out the possibility of marital rape when the age of wife is above fifteen years. On the other hand, if the girl is not the wife of the man, but is below sixteen, then the sexual intercourse even with the consent of the girl amounts to rape? It is rather shocking to note the specific relaxation is given to a husband who rapes his wife, when she happens to be between 15-16 years. This provision in the Penal Code, 1860, is a specific illustration of legislative endorsement and sanction to child marriages. Thus by keeping a lower age of consent for marital intercourse, it seems that the legislature has legitimized the concept of child marriage. The Indian Majority Act, 1875 lays down eighteen years as the age of majority but the non obstante clause (notwithstanding anything contrary) excludes marriage, divorce, dower and adoption from the operation of the Act with the result that the age of majority of an individual in these matters is governed by the personal law to which he is a subject. This saving clause silently approves of the child marriage which is in accordance with the personal law and customs of the religion. It is to be specifically noted that the other legislations like the Penal Code, 1860 and Indian Majority Act are pre independence legislations whereas the Hindu Minority and Guardianship Act is one enacted in the post independent era. Another post independent social welfare legislation, the Dowry Prohibition Act, 1961 also contains provisions which give implied validity to minor's marriages. The words "when the woman was minor' used in section 6(1)(c) reflects the implied legislative acceptance of the child marriage. Criminal Procedure Code, 1973 also contains a provision which incorporates the legislative endorsement of Child Marriage. The Code makes it obligatory for the father of the minor married female child to provide Maintenance to her in case her husband lacks sufficient means to Maintain her.

33. The insertion of option of dissolution of marriage by a female under Section 13(2)(iv) to the Hindu Marriage Act through an amendment in 1976 indicates the silent acceptance of child marriages. The option of puberty provides a special ground for divorce for a girl who gets married before attaining fifteen years of age and who repudiates the marriage between 15-18 years.

34. Legislative endorsement and acceptance which confers validity to minor's marriage in other statutes definitely destroys the very purpose and object of the PCM Act-to restrain and to prevent the solemnization of Child Marriage. These provisions containing legal validity provide an assurance to the parents and guardians that the legal rights of the married minors are secured. The acceptance and acknowledgement of such legal rights itself and providing a validity of Child Marriage defeats the legislative intention to curb the social evil of Child Marriage.

35. Thus, even after the passing of the new Act i.e. the Prohibition of Child Marriage Act 2006, certain loopholes still remain, the legislations are weak as they do not actually prohibit child marriage. It can

be said that though the practice of child marriage has been discouraged by the legislations but it has not been completely banned.

39. As held above, PCM Act, 2006 does not render such a marriage as void but only declares it as voidable, though it leads to an anomalous situation where on the one hand child marriage is treated as offence which is punishable under law and on the other hand, it still treats this marriage as valid, i.e., voidable till it is declared as void. We would also hasten to add that there is no challenge to the validity of the provisions and therefore, declaration by the legislature of such a marriage as voidable even when it is treated as violation of human rights and also punishable as criminal offence as proper or not, cannot be gone into in these proceedings. The remedy lies with the legislature which should take adequate steps by not only incorporating changes under the PCM Act, 2006 but also corresponding amendments in various other laws noted above. In this behalf, we would like to point out that the Law Commission has made certain recommendations to improve the laws related to child marriage.

40. Be as it may, having regard to the legal/statutory position that stands as of now leaves us to answer first part of question No. 1 by concluding that the marriage contracted with a female of less than 18 years or a male of less than 21 years would not be a void marriage but voidable one, which would become valid if no steps are taken by such "child" within the meaning of Section 2(a) of the PCM Act, 2002 under Section 3 of the said Act seeking declaration of this marriage as void."

22. It must be remarked here that the submission of Mr. Indrajeet Singh, learned A.G.A., that once Section 5 (iii) mandates a minimum age for the marriage of a man or a woman as an essential requirement of a valid Hindu marriage, its violation not being held to render the marriage void, would be an abnegation of the Statute, may not be the correct statement of the law on the terms of the HMA, but does point to an anomaly that may be described by the words 'intended to be forbidden, but permitted'. It is this anomaly about the legislature disapproving of child marriages and yet permitting them, that has led their Lordships of the Full Bench in **Lajja Devi** to discern across provisions of different statutes a kind of "legislative endorsement of child marriage". It is gratifying to note that one facet of this anomalous statutory approval to a child marriage carried in the Penal Code, which has been noticed with distress by their Lordships of the Full Bench in **Lajja Devi** about sex being legitimized with a minor wife for the husband, provided the woman is above the age of 15 years, has been undone in **Independent Thought v. Union of India and Another**6. In the said decision, exception 2 to Section 375 of the Indian Penal Code, 18607 has been harmonised with the provisions of the Protection of Children from Sexual Offences Act, 20128 and held to be violative of Articles 14, 15 and 21 of the Constitution. And accordingly, Exception 2 to Section 375 IPC has been read down as under :

"Exception 2-- Sexual intercourse or sexual acts by a man with his own wife, the wife not being 18 years, is not rape."

23. In the aforesaid perspective of the law, it must be held in terms of the question framed that marriage of a minor in contravention of Section 5(iii) of the HMA and Section 3(1) of the PCMA is not void ab initio for a rule, but voidable at the

option of the minor. But, if any of the contingencies contemplated under Section 12 of the PCMA exist and can be proved, the marriage would be void.

24. Now, with reference to this conclusion about the legal position of the minor's marriage, it has to be examined whether the marriage of Manish Kumar and Jyoti is valid, void or voidable. It must be remarked here that there is one feature of the case here that makes it quite different, if not unique, from those that have received judicial consideration and that is, that the husband is a minor, whereas the wife is a major. The husband was 16 years old at the time of marriage and is now 17 years of age, whereas the wife is a major. This fact would further not make any difference, so far as the present question is concerned. What is worthy of note is Manish's stand before the Court on 23.09.2020, which clearly indicates that he has married Jyoti of his freewill and wishes to stay with his wife and mother-in-law. This stand clearly takes the case out of the mischief of Section 12 of the PCMA, so that the marriage in this case cannot be termed "void". No doubt, this marriage would be voidable at Manish's option, that he may exercise in accordance with the provision of Section 3 of the PCMA.

25. Thus, Question No. 1 (as reformulated) is answered in the ***negative***, in the terms indicated hereinabove.

QUESTION NOS. 2, 3 & 4

26. Question Nos. 2, 3 and 4 carry different facets of the same issue, if not precisely, substantially, and are, therefore, being dealt with together.

27. Mr. Anand Kumar Srivastava, learned Counsel for the petitioners submits, particularly with reference to question nos.2 and 4, that a minor, who does not want to stay with his parents, is entitled to stay with a person of his choice, particularly, where he is on the verge of attaining majority and in the age group of expressing his intelligent choice. He says that the paramount consideration is the minor's welfare. In this connection he has drawn the Court's attention to Section 17 of the Guardians and Wards Act, 18909 and Section 13 of the Hindu Minority and Guardianship Act, 195610.

28. Again, reliance has been placed by the learned Counsel for the petitioners on the decision of the Full Bench of the Madras High Court in **T. Sivakumar (supra)** to submit that where the child's marriage is an offence, it would certainly not be in the interest of the minor to be placed in the custody of the other spouse as his/her guardian, for the reason that approving that custody would be sanctifying an offence. Reliance has been placed by the learned Counsel for the petitioners on paragraph no. 34 of the report in **T. Sivakumar**, which reads :

"34. We may also state that since a child marriage as defined in the Prohibition of Child Marriage Act itself is an offence and the same is cognizable, it does not require any complaint to the police to register a case and to investigate. On any information regarding such a child marriage, the Police has got a legal duty to register a case and to prosecute the offender by filing an appropriate final report. If the contracting party to the marriage of a female child is a male who is not a child undoubtedly, he is an offender punishable under Section 9 of the Act. The scheme of the Act would go to show that punishment has been provided only against an adult male marrying a female child

but an adult female marrying a male child is not an offender as she does not fall within the ambit of Section 9 of the Act. Sections 10 & 11 provide for punishment for solemnising a child marriage and promoting or permitting solemnisation of child marriages. So, it needs to be underscored that only the male namely the husband is liable to be punished and not the girl whether child or an adult. This scheme of the Act would also go to support the view that an adult male who marries a female child cannot be allowed to enjoy the fruits of such marriage because the solemnisation of the marriage itself is an offence insofar as the male is concerned. If we have to accept the contention that as per Section 6(c) of the Hindu Minority and Guardianship Act, the husband of a female child shall be the natural guardian, it will only amount to giving premium for the offence committed by the male. When the law aims at eradicating the evil menace of child marriages, declaring the adult male who marries a female child, as her natural guardian would only defeat the very object of the Act. A law cannot be interpreted so as to make it either redundant or unworkable or to defeat the very object of the Act. Thus, by committing an offence punishable under Section 9 of the Act, the adult male cannot acquire the legal status of the natural guardian of the female child. In view of these discussions, we hold that Section 6(c) of the Hindu Minority and Guardianship Act stands impliedly repealed by the Prohibition of Child Marriage Act. Therefore, we conclude that an adult male who marries a female child in violation of Section 3 of the Prohibition of Child Marriage Act shall not become the natural guardian of the female child."

29. Mr. Sudhanshu Kumar, learned Counsel appearing on behalf of respondent no. 5, on the other hand, has repelled the submissions of the petitioners on this score. He submits that a minor on the verge of attaining majority and one who is in the age group of expressing his intelligent choice, if expresses a desire not to stay with his parents, cannot be compelled to be in the parents' custody. He has, particularly, drawn the attention of the Court to sub-Section (3) of Section 17 of the Act of 1890, which provides that preference of a minor may be considered in appointing a guardian, if he is old enough to form an intelligent preference.

30. Interestingly, Mr. Sudhanshu Kumar, learned Counsel for the fifth respondent has also reposed faith in the Full Bench decision of the Madras High Court in **T. Sivakumar.** He has invited the attention of this Court to paragraph no. 57 of the report, where in answer to the various questions referred by the Division Bench, it has been held :

"57. In conclusion, to sum up, our answers to the questions referred to by the Division Bench are as follows:

(i) The marriage contracted by a person with a female of less than 18 years is voidable and the same shall be subsisting until it is annulled by a competent Court under Section 3 of the Prohibition of Child Marriage Act. The said marriage is not a "valid marriage" stricto sensu as per the classification but it is "not invalid". The male contracting party shall not enjoin all the rights which would otherwise emanate from a valid marriage stricto sensu, instead he will enjoin only limited rights.

(ii) The adult male contracting party to a child marriage with a female child shall not be the natural guardian of the female child in view of the implied repealing of Section 6(c) of the Hindu Minority and Guardianship Act, 1956.

(iii) The male contracting party of a child marriage shall not be entitled for the custody of the female child whose marriage has been contracted by him even if the

female child expresses her desire to go to his custody. However, as an interested person in the welfare of the minor girl, he may apply to the Court to set her at liberty if she is illegally detained by anybody.

(iv) In a Habeas Corpus proceeding, while granting custody of a minor girl, the Court shall consider the paramount welfare including the safety of the minor girl not withstanding the legal right of the person who seeks custody and grant of custody in a Habeas Corpus proceeding shall not prejudice the legal rights of the parties to approach the Civil Court for appropriate relief.

(v) Whether a minor girl has reached the age of discretion is a question of fact which the Court has to decide based on the facts and circumstances of each case.

(vi) The minor girl cannot be allowed to walk away from the legal guardianship of her parents. But, if she expresses her desire not to go with her parents, provided in the opinion of the Court she has capacity to determine, the Court cannot compel her to go to the custody of her parents and instead, the Court may entrust her in the custody of a fit person subject to her volition.

(vii) If the minor girl expresses her desire not to go with her parents, provided in the opinion of the Court she has capacity to determine, the Court may order her to be kept in a children home set up for children in need of care and protection under the provisions of the Juvenile Justice (Care and Protection) Act and at any cost she shall not be kept in a special home or observation home meant for juveniles in conflict with law established under the Juvenile Justice (Care and Protection) Act, 2000

(viii) A minor girl whose marriage has been contracted in violation of Section 3 of the Prohibition of Child Marriage Act is not an offender either under Section 9 of the Act or under Section 18 of the Hindu Marriage Act and so she is not a juvenile in conflict with law.

(ix) While considering the custody of a minor girl in a Habeas Corpus proceeding, the Court may take into consideration the principles embodied in Sections 17 & 19(a) of the Guardians and Wards Act, 1890 for guidance."

(Emphasis by Court)

31. Particularly, with regard to the contents of Question No. 4, that concerns the minor, who has expressed his intelligent choice of not living with his parents, it is urged that he is entitled to stay with a person whom he chooses. Mr. Sudhanshu Kumar has placed reliance on a decision of this Court in the case of **Akbar and Another v. State of U.P. and Others**11. It is pointed out that the aforesaid decision in **Akbar (supra)** was affirmed by the Supreme Court in **Special Leave to Appeal (Crl.) No.2664 of 2008**, **Shahnaz Begum v. State of U.P. & Ors., decided on 23.02.2016**. The impact of all these decisions would be considered during the course of our answer to these questions, a little later in this judgment.

32. Generally, on the foot of these decisions, Mr. Sudhanshu Kumar has submitted that the position of the law is that a minor may be allowed to stay with a person of his choice and not to stay with his parents, if he so desires, particularly when such a minor is found to be possessed of sufficient intelligence and understanding to determine his own well being. It is emphasized by Mr. Sudhanshu Kumar, that Manish Kumar was aged 16 years and 6 months, when he expressed his choice before this Court on 23.09.2020 that he does not want to go with his mother, but

wishes to stay with respondent nos.5 and 8. Dilating on this submission, learned Counsel for the fifth respondent says that Manish Kumar is on the verge of attaining majority and is in the age group of expressing his intelligent choice. He possesses sufficient understanding to make that choice. He has not expressed this choice rashly or without comprehending the impact of the same on his life and future. Learned Counsel for the fifth respondent also says that there is nothing on record to show that Manish Kumar is under the influence or threat of respondent nos.5 to 8, particularly, going by the tenor of expression of his choice before this Court on 23.09.2020. Learned Counsel submits that the reason behind the choice expressed by Manish Kumar appears to be the fact that he married respondent no. 8 of his free will and wishes to stay with her in matrimony.

33. To the contrary, Mr. Sudhanshu Kumar submits that the second petitioner is against Manish's marriage and refused to permit Manish and respondent no. 8 to live together in her house. It was in those circumstances that petitioner no. 1 approached the fifth respondent to stay with her along with his wife. Respondent no. 5 took Manish in her custody and permitted him to stay with her along with his wife, once Manish's mother gave up his custody. It is strongly suggested by the learned Counsel that this arrangement was with the consent of the second petitioner, as evident from the agreement dated 22.02.2020, where she has appended her thumb impression. A copy of the agreement is on record as Annexure no. CA-1 to the counter affidavit.

34. Attention of this Court has been drawn by the learned Counsel for the fifth respondent to paragraph nos.5 and 15 of the said respondent's counter affidavit, where it is said that petitioner no.2 threw out Manish from her home and it was then that the fifth respondent gave him shelter. It is emphasized by the learned Counsel for the fifth respondent that there is no specific denial to the said averments in the rejoinder affidavit. The learned Counsel for the fifth respondent submits that it seems that Manish expressed his choice of not staying with his mother due to her conduct in throwing him out of her home, along with his wife, at a time when his wife was in the family way. At a time of such turmoil, Manish was given shelter, love, affection and care by the fifth respondent. Therefore, Manish has expressed a choice, in all these circumstances, to forsake his mother's custody for that of his mother-in-law. Mr. Sudhanshu Kumar says that the expression of Manish's choice, therefore, is not only intelligent, but one that is well-informed by his experience and circumstances.

35. On the third question, Mr. Sudhanshu Kumar, learned Counsel for the fifth respondent submits that the rights of a parent as the minor's natural guardian cannot be enforced against the minor's wishes and welfare, inasmuch as guardianship is akin to a trust where the guardian has to act as a trustee for the benefit of the minor. A fortiori, guardianship - like the right of a trustee, cannot be enforced against the interest of the beneficiary, the minor. Learned Counsel for the fifth respondent further submits that the position of law is beyond cavil that in determining the question of custody, welfare of the minor is of paramount consideration and not the legal right of the parent. In this context, he has drawn the attention of the Court to the provisions of Section 13(2) of the Act of

1956, which specifically provide that no person is entitled to guardianship by virtue of the provisions of law, if in the opinion of the Court, his/ her guardianship will not be for the minor's welfare. To support his contention, learned Counsel for the fifth respondent has placed reliance on the decision of the Supreme Court in **Gaurav Nagpal v. Sumedha Nagpal**12 and once again on the Full Bench decision of the Madras High Court in **T. Sivakumar (supra).** It is submitted by the learned Counsel for the fifth respondent that it figures clearly on record that Manish's mother, the second petitioner, refused to allow him to live with her and threw out Manish along with his wife. It was then that Manish took shelter with the fifth respondent. In this connection, Mr. Sudhanshu Kumar has emphasized that in **Gaurav Nagpal (supra),** their Lordships of the Supreme Court have emphasized that children are not mere chattels nor toys for their parents. He submits, therefore, that the second petitioner cannot be allowed to throw Manish out of her house and then compel him to live with her, as and when she desires. Mr. Sudhanshu Kumar would, therefore, submit that for a blanket proposition of law, a minor, who stays away from his parents or natural guardian with a stranger of his/ her choice, cannot be compelled by the natural guardian to be restored to his custody, particularly through a Writ of Habeas Corpus. Of course, it would depend upon the Court coming to the conclusion that the minor's welfare is adequately secured with the stranger, in the totality of circumstances governing this rather unconventional move.

36. Mr. Rajeev Lochan Shukla, learned Amicus Curiae has struck a discordant note to the stand taken on behalf of fifth respondent, generally as regards the rights of a minor to choose strangers for their guardian over parents. In his submission on the second question, it is urged that there are two facets about the minor choosing a stranger for a guardian over his parent. He submits that the first is about the intelligent choice exercised by the minor, and the second, is about the minor being on the verge of majority. Mr. Shukla has, in this connection, referred to the law on the subject in the United States of America, but for the purpose he has largely depended on internet resources. Nevertheless, some reference may be gainfully made to it. He points out that in the United States of America and in Canada, there are laws for emancipation of the minor. The emancipation of minor is based on a doctrine governing rights of a mature minor. The mature minor doctrine is a rule of law, where an unemancipated minor patient may possess the maturity to choose or reject a particular health care treatment, sometimes without the knowledge or the agreement of the parents. In this connection, reference has been made to a decision of the Supreme Court of Washington in **Albert G. Smith v. Walter W. Seibly**13, where the doctrine in the case of a mature minor, who had married and had a family, was applied to infer valid consent to a vasectomy procedure given by Albert G. Smith, who was 18 years old and the married father of a child. He was employed and had a family. He also maintained a home. The facts in the decision show that Smith was afflicted by a progressive muscular disease, Myasthenia Gravis, which is chronic and incurable and would possibly affect his future earning capacity and ability to support his family. Under the circumstances, Smith and his wife decided to limit their family, with the husband consenting to undergo sterilization. It appears that Smith was not

of the age of majority by the law in force in the State. After Smith attained age of majority, he brought an action saying that the doctor was negligent in performing the vasectomy upon a minor of 18 years; he was negligent in failing to explain to the appellant the perennial consequences of the surgery and further that the procedure was done without valid consent. In this case, the Court appears to have applied the principle of mature minor, being emancipated from his disability to give a valid consent by virtue of his marriage and being the head of his family. Mr. Shukla points out that the concept of emancipation of a minor is defined in the Black's Law Dictionary, Ninth Edition, thus :

"emancipation. (17c) 2. A surrender and renunciation of the correlative rights and duties concerning the care, custody, and earnings of a child; the act by which a parent (historically a father) frees a child and gives the child the right to his or her own earnings. - This act also frees the parent from all legal obligations of support. Emancipation may take place by agreement between the parent and child, by operation of law (as when the parent abandons or fails to support the child), or when the child gets legally married or enters the armed forces."

Likewise, emancipation in the context of a minor is defined in the Law Lexicon by P. Ramnatha Aiyar, 3rd Edition (2012) at page 545, in the following words :

"Ordinarily speaking, one of these things must happen before a SON CAN BE SAID TO BE EMANCIPATED FROM HIS FATHER, either he must have obtained a settlement for himself-or have become the head of a family,-or at most he must have arrived at that age when he may set up in the word for himself." (Per Kenyon, C.J. R. v. Off-Church, 3 T.R. 116)"

37. These principles, Mr. Shukla submits, do indicate that in some foreign jurisdictions, marriage of a minor at a matured age and supporting his family may entitle him to an end of guardianship for him, but there is no principle in the Corpus Juris of India akin to emancipation of the minor, or the mature minor doctrine, so as to liberate the minor from the guardian's control and launch him out into the world as a major, before he attains the legal age of majority. He submits that the question about the minor exercising an intelligent choice does not bring about an end to his disability flowing from his minority, but is confined to the choice about his guardian. Mr. Shukla submits that it is not that the law in India completely disregards that watershed age of minors, where they are about to enter adulthood. He points out that it is for this reason that under Section 15 of the Juvenile Justice (Care and Protection of Children) Act, 201514, the law provides for a child in conflict with law, who is in the age group of 16 to 18, to be tried as an adult after a preliminary assessment with respect to his mental and physical capacity to commit the offence charged and to understand the consequences of the offence. In substance, therefore, the law in India does recognize the ability of the minors on the verge of attaining majority to understand the consequences of their action, and on that basis, gives them some rights and imposes certain additional liability; but it does not emancipate them unconditionally.

38. In the matter of choice of a guardian, other than his parents, Mr. Shukla says that the law in India has recognized

the welfare of the minor, in certain cases, to be secured better in the hands of strangers. In this connection, reference has again been made to the case of **Akbar (supra)**. He points out that **Akbar** was a case, where a minor child of 10 years, a Muslim was given into the custody of one Aiku Lal, a stranger and a Hindu, professing a religion different from that of the child, with this Court giving weight to the preference expressed by the child. The natural guardians were denied custody, bearing in mind the child's welfare, on a consideration of various circumstances, amongst which, the preference of the child was accorded decisive weight. The decision in **Akbar (supra)** was upheld by the Supreme Court in **Shahnaz Begum (supra).** It is urged that there is, thus, no impediment where in the facts of a given case, a minor's custody can be given to a stranger over the claim of his natural guardian, if the minor's welfare is better secured. In doing so, it is argued that welfare of the minor is decisive. It is pointed out by Mr. Shukla that the question that arises here is one of great complexity. The minor has clearly expressed his choice to stay with his wife and mother-in-law and not his mother. On the other hand, the Act of 2012 makes cohabitation of a minor boy with a major girl an offence, which would certainly be committed, if Manish is entrusted to the custody of his wife, who is now a major. The imminent likelihood of cohabitation is demonstrated by the fact that the wife has now given birth to a child, begotten of Manish. It is submitted that allowing Manish to be given into the custody of his wife or the mother-in-law would lead to perpetration and perpetuation of an offence under the Act of 2012, which this Court cannot permit.

39. It is next contended that the PCMA punishes the solemnization of a child marriage as also promoting or permitting the solemnization of such marriages. It is contended that here, the mother-in-law is within the mischief of Sections 10 and 11 of the PCMA. Therefore, Manish cannot be given into her custody, being a victim of the crime she has perpetrated by getting him married to her daughter, who is now a major. It is urged that for different reasons, Manish's custody cannot be given to either the wife or the mother-in-law. It is, in the last, urged by Mr. Shukla, so far as Question No. 2 goes, that the decision of the Supreme Court in **Independent Thought (supra**) clearly spells out the serious consequences of a child marriage, albeit from the perspective of a girl child. He submits that there is no reason why those consequences and the resultant disapproval to child marriages would not be equally applicable to a male minor married to a female major.

40. The submissions on Question Nos. 3 and 4 put forward by Mr. Shukla, learned Amicus Curiae proceed on the same line. He says that a writ of habeas corpus can issue in this case, because Manish is in the unlawful custody of a stranger and his mother is entitled to maintain the writ, relying on the decision of the Supreme Court in **Tejaswini Gaud and Others v. Shekhar Jagdish Prasad Tewari and Others**15.

41. On the fourth question, Mr. Shukla says that while there is no cavil about the principle that in certain cases, custody of a minor can be entrusted to an utter stranger, ignoring the right of the natural guardian, if the minor's welfare is better secured, as was the case in **Akbar (supra),** the present case stands in sharp distinction on its facts. The reason, according to Mr. Shukla, is that the mother-

in-law is guilty of an offence under the PCMA, whereas the wife, who is a major, is guilty of committing an offence under the Act of 2012 and would be guilty of a continuing offence under that Act, if Manish's custody is entrusted to her (the wife).

42. Mr. Ashutosh Yadav, the other Amicus Curiae appearing in the matter on the second question, has submitted that the Court would have to consider the overall facts and circumstances of the case to determine whether a minor of mature years with sufficient intelligence would have his welfare better secured in the hands of a stranger over that of his parents and natural guardian. He submits that if the Court considers that a person of the minor's choice, who is a stranger, is better placed to secure his welfare and take care of his needs in comparison to his parents or the natural guardian, there is no fetter on the Court's power to grant custody of a minor to a person of the minor's choice. The learned Amicus Curiae has said that this Court would have to assess on the facts here, whether the wife and the mother-in-law are better placed to take care of the minor's need and to ensure his welfare in comparison to his mother.

43. On the third question, Mr. Yadav says that there would be a decisive divide between the criteria to be adopted while compelling custody of a minor to be restored to his natural guardian, taking it away from a stranger through a writ of habeas corpus, depending on the minor's age. He submits that in case of minors aged 12 - 13 years, who have not developed sufficient understanding and intelligence to decide about their welfare, the Court may lean in favour of restoring custody to the parents, but in the case of a minor, who is on the verge of attaining majority and has sufficient understanding about his interest, must receive due deference about his choice in the matter of his custody. All that is required is that the minor must give strong reasons as to why he does not wish to remain with the natural guardian; and if he has valid reasons to forsake the custody of his natural guardian for a stranger, the Court must give due weight to it, together with other relevant circumstances. This is the purport of Sections 17(2) and 17(3) of the Act of 1890.

44. Now, so far as the fourth question is concerned, Mr. Yadav submits that if the Court is convinced that the welfare of the minor is better secured in the hands of an utter stranger, compared to his natural guardian or parent, there is no impediment in entrusting the minor's custody to a stranger, depriving the natural guardian. The Court has to ensure that the welfare of the minor is best secured (in the hands of a stranger) and that conclusion is to be based on a number of factors, that have to be inferred from evidence, the facts and circumstances on record, on a case-to-case basis. But, for a principle, an utter stranger may be preferred by the Court over a natural guardian.

45. This Court has considered the rival submissions, vis-à-vis Question Nos. 2, 3 and 4 and perused the record.

46. The substance of all the three questions, which this Court has indicated in the earlier part of this judgment to be dealt with together, is no more than this : Whether a minor, going by his choice, can be permitted to live with an utter stranger, though his natural guardian claims his custody? It does not brook doubt that guardianship and custody may not always

be the same thing; though, for the most part, they coalesce. There are cases under various Statutes governing guardianship and custody, where guardianship being with one parent, the custody is given to the other, where the two do not live together. No doubt, between parents, arrangements have to be made through devises, such as visitation rights in order not to further deprive the child's company to the other parent, who has been denied custody. But, all that is not relevant here. The distinction between "guardianship" and "custody" is well elucidated in the decision of the Bombay High Court in **Ramesh Tukaram Gadhwe and Others v. Sumanbai Wamanrao Gondkar and Another**16, where it has been held:

"20. There is subtle distinction between expression "Custody" and "Guardianship". The concept of custody is related to physical control over a person or property. The concept of guardianship is akin to trusteeship. A guardian is trustee in relation to the person of whom he is so appointed. The position of guardian is more onerous than of mere custodian. The custody may be for short duration and for specific purpose. ....."

47. Like custody, guardianship, which is, truly speaking, a responsibility and a trust reposed in an adult to take care of the needs and welfare of his ward, generally arises in two ways : (1) by the nature of the relationship of the guardian to the ward, what is generally referred to as a natural guardianship, say a father and son or a mother and son; and (2) by appointment or declaration made by the Court or by testament. The Act of 1890 is a law of universal application to minors of all creeds and races, as the statement of objects and reasons discloses, and is thus applicable to all persons domiciled in territories to which the Act extends, irrespective of caste, creed, religion etc. There are then Statutes that enforce personal laws of different religious communities, governing the subject of guardianship, like the Act of 1956 in relation to Hindus, the rules of uncodified Muslim Personal Law, that are applied by virtue of being law in force in India, when the Constitution was enforced. But, whatever rules might have been devised as personal to different communities, the principles in the Act of 1890 have overriding effect. One of the principles that has withstood the test of time and is so universal in its application that it is recognized as good in jurisdictions beyond India, is that in the matter of appointment of a guardian or enstrustment of custody of a minor to a guardian, welfare of the child is of paramount importance. Section 17 of the Act of 1890 may be quoted in extenso:

"17. Matters to be considered by the Court in appointing guardian.--(1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.

(2) In considering what will be for the welfare of the minor, the Court shall have regard the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.

(3) If the minor is old enough to form an intelligent preference, the Court may consider that preference.

(4) [omitted by Act 3 of 1951 by S. 3 and Sch.]

(5) The Court shall not appoint or declare any person to be a guardian against his will."

(Emphasis by Court)

48. Generally speaking, the criteria to determine welfare of the minor are the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor. The wishes of the deceased parent and any existing or previous relations of the proposed guardian with the minor or his property have also to be taken into account. All these factors find mention in sub-Section (2) of Section 17. Sub-Section (3) of Section 17 adds one more factor for the Court to take into consideration, while determining the minor's welfare, and that is the minor's intelligent preference, if the minor is old enough. The scheme of Section 17, in particular, sub-Sections (2) and (3) read together, shows that for older minors, capable of forming an intelligent preference, special emphasis has been placed by the legislature on their choice in the matter of determining their welfare. Unlike the other criteria that must go into the Court's decision about the minor's welfare, the choice of an older minor, capable of forming an intelligent preference, has been separately placed in a different sub-Section, whereas the other relevant criteria are mentioned together in sub-Section (2). To this Court's understanding, the legislative intent is clear that an older minor's choice is to be accorded some higher weightage by the Court, together with the other criteria, while deciding the question of his/her welfare. This is not to say that for an older minor, who is in a position to form an intelligent preference, his expressed choice is a substitute for the Court's determination about his welfare. Many factors have to enter the Court's determination while deciding the vexed question about the minor's welfare.

49. It must also be remarked that the criteria mentioned in sub-Section (2) of Section 17 do not appear to be exhaustive, but illustrative; also those criteria are not binding or unignorable in the given circumstances of a case. If that were not so, the decision of this Court in **Akbar**, which met with approval of the Supreme Court in **Shahnaz Begum (supra),** would not have held Aiku Lal, a Hindu, unrelated to the minor in that case, a Muslim, better entitled than his natural guardian, who had petitioned the Court for the minor's custody. The decision in **Akbar** countervailed two of the relevant criteria, enumerated under sub-Section (2) of Section 17 of the Act of 1890, to wit, the natural guardian's nearness of kin to the minor and the religion of the two. The totality of circumstances, that were noticed in **Akbar** and weighed with the Court, are expressed thus :

"12. That child is now 10 year and during the conversation in court with him, we found that he was possessed of sufficient understanding to comprehend matters and visualise his own well being. The child explicitly and categorically stated before us, that he does not want to go with his parents, and wants to continue to live with Aiku Lal.

13. It will be seen, that the father did not take proper care, of the child, in consequence whereof, the child disappeared. It will be seen that the father was careless, and, that is what led to disappearance of the child. On the contrary, respondent Aiku Lal has maintained the

same name of the child, in the school, and is not trying to change his Religion and is taking proper care of the child, and under his pateria-potesta, the child is receiving education in school, and he has developed an attachment for him and is keeping him like a son.

14. In these circumstances, the respondent seems more suitable to look-after the welfare of the minor, as compared to his parents.

15. It was argued that respondent Aiku Lal is a Hindu, while, the child is a Muslim and this will create dichotomy and disharmony in the social sphere and in their relationship. As mentioned earlier, the foremost consideration has to be the welfare of the minor and the mere fact that respondent Aiku Lal is a Hindu, while the child is a Muslim, should not dis-entitle respondent Aiku Lal from holding the custody of the child. We are after all a secular country and the consideration of caste and creed should not be allowed to prevail. If there can be inter-caste marriages, which is not very uncommon, there can also be an inter-caste 'Father and Son' relationship and that need not raise eyebrows. It would not be fair and equitable to return the minor to his parents against his will. The preference of the child must be given due weightage.

16. On a consideration of the entire matter, we are of the view that the child should be allowed to remain with Aiku Lal, and should not be returned, to his parents against his wishes."

50. In the affirming judgment of the Supreme Court in **Shahnaz Begum (supra)**, their Lordships generally approved of this Court's view and also did not disturb the custody given to Aiku Lal, but made an arrangement for Akbar to go during the summer vacations every year to his mother, till he attained the age of majority, and come back to Aiku Lal at the end of the vacation. It was, thus, a kind of visitation right given to the mother; but custody was approved for Aiku Lal, as directed by this Court. The decision in **Akbar (supra)** is a sterling illustration about many things relating to guardianship and custody of minors. It unshackled the preconceived notions of a society of yesteryears, where kinship and religion played a decisive role in judging the suitability of a guardian for appointment, as such, to take care of a minor or to be given a minor's custody. The evolving society has done better to realize that there could be far subtler dimensions to human qualities and human relationship, that would better serve the attainment of the object of securing the minor's welfare, than stereotyped prejudices passed on from an older social order. This is not to say in the least measure that whatever considerations have been engrafted in the Statute are irrelevant, or required to be ignored in the present day. All that is to be emphasized is that if the welfare of the minor, in the judgment of the Court in a given case, is to be found better served, cutting across one or the other criteria statutorily laid down, the Court must lean in favour of welfare of the minor, ameliorating the letter of the law.

51. The question of intelligent preference of an older minor must be judged differently in contrast to a younger child, who may not understand many things. But again, unless the child is very young, chronological age may not be decisive in all cases. There could be cases of 8 or 10 year olds coming out to express very intelligent preferences about their guardian, which must be accorded due weightage by the Court. At the same time, there could be converse cases too. A fairly

old boy or girl, who is just technically a minor, may still be found by the Court not expressing an intelligent preference that best subserve his/her welfare. These situations could all be there and have to be assessed on a case-to-case basis. Nevertheless, there is certainly a presumption that with a minor moving towards the age of majority, his mental faculties are oriented more towards attaining that maturity of intellect, where he could be generally trusted for the expression of an intelligent preference in the matter of choice of his guardians or custody of the person, he would be liked to be with.

52. It is no matter of legislative adventure that children in conflict with law in the age group of 16 to 18 years have been recognized as a different class under Section 15(1) read with Section 18(3) of the Act of 2015, where the Board is required to conduct a preliminary assessment with regard to the child's mental and physical capacity to commit such offence, the ability to understand the consequences of the offence and the circumstances in which he allegedly committed the offence, to borrow the phraseology of the Statute. And once the Board finds, after a preliminary inquiry under Section 15, that a child in that age group has the necessary physical and mental capacity to understand the consequences of the offence and the attendant circumstances, he may be ordered to be tried as an adult, quite removed from the protective regime of the Act of 2015. Though in a very different context, the provisions of the Act last mentioned are a legislative acknowledgment of the possibility of near adult mental faculties of a child in the age group of 16 - 18, though still not a major. In this context, therefore, with a child, who is knocking at the doors of majority, and certainly where he is above the age of 16, the Court may be more liberal in inferring an intelligent choice, or expecting an intelligent choice from a minor in that age group, in the matter of choice of his guardian or custody.

53. The decision of the Full Bench of the Madras High Court, though rendered in the context of a minor girl marrying an adult man, but the principles laid down there would apply equally in answer to the three questions, that have been dealt with here together. Particularly, the answers in sub-paras (v), (vi) and (vii) of paragraph no. 57 of the report in **T. Sivakumar (supra)** are apposite to the issues involved here.

54. It must be mentioned in the passing here that the question about emancipation of a minor was very interestingly raised by Mr. Sudhanshu Kumar during the course of the hearing, which lasted several days in this case. Though the parties were much handicapped in laying hands on dependable material about the principles relating to emancipation and the mature minor doctrine, it must be said in all fairness to learned Counsel appearing on all sides and the two learned Amicus Curiae, particularly Mr. Shukla, that they did place before the Court best material that they could lay their hands on. Much of it depended on internet resource, about which this Court has some hesitation accepting in the absence of very dependable and authentic websites/resources. But, be that as it may, there is no quarrel between parties that emancipation of a minor or the mature minor doctrine does not appear to have gained foothold, at least in the context of the guardianship law in India, and,

therefore, this Court refrains from expressing any opinion about all that was argued about it by the learned Counsel for the parties, as well as the learned Amicus Curiae.

55. It also deserves particular mention that the principles about utter strangers being appointed guardians or entrusted the custody of minors, in preference to a natural guardian, going by the intelligent preference expressed by minors in the facts of a given case, are all based on cases where it was not a minor boy marrying a major girl or a girl, who had become a major when the cause came up. Most of the authorities have been rendered in the context of either a non-matrimonial background, or where the girl was a minor and the husband, a major. About a minor girl and a major husband, the law has certainly not favoured a minor girl, notwithstanding a marriage that is not void under the PCMA to be permitted to stay with the husband, as that would be clearly an offence by the husband under the PCMA, as well as under the Penal Code, after the decision of the Supreme Court in **Independent Thought**. In the case of a minor boy and a girl, who is a major, the PCMA does not make it an offence for the major girl to marry a minor boy in violation of the PCMA, and likewise, the principles in **Independent Thought** may not squarely apply to the case of a minor boy and a major girl. Mr. Rajeev Lochan Shukla argued with great vehemence that this approach would be discriminatory. He may have some point to be considered on this score, but not in the conspectus of the questions that arise here for consideration, and may be, within the scope of the cause of action that arises in this habeas corpus petition, where there is no challenge to the vires of the statutory provisions, that seem to discriminate between citizens on the ground of sex in the matter of marriage. One such provision is Section 6(c) of the Act of 1956, which provides that in the case of a married girl, the husband would be the natural guardian of her person as well as property (excluding her undivided interest in the joint family property). The Full Bench in **T. Sivakumar** have read the provisions of the PCMA as an implied repeal of Section 6(c) of the Act of 1956. There are similar provisions under some other Statutes, to which allusion would be made in answer to the fifth question.

56. In view of what has been said above, Question No. 2 is answered in the ***affirmative*** in the terms that depending on the totality of circumstances of a given case and the expression of his intelligent choice by a minor, who is on the verge of attaining majority, the Court may, in a given case, permit a minor to stay with a person of his choice in preference to his parents or other natural guardians.

57. Question No. 3 is answered in the ***negative*** in terms that where a minor decides to stay away from his parents or natural guardian with a stranger of his choice, he cannot be compelled to be restored to the custody of a natural guardians through a writ of habeas corpus, subject to the condition that the Court comes to the conclusion that the welfare of the minor is better secured with the stranger, in comparison to the natural guardian. Of course, the Court must go about this exercise very carefully.

58. Question No. 4, for the same reason as those relevant to question no.3, is answered in the ***affirmative*** with the qualification that the Court before entrusting custody of a minor to an utter

stranger, should be clearly and unequivocally satisfied on evidence in the case, that the minor's welfare is decidedly better secured in the stranger's hands, than the natural guardians.

59. The Court must add a postscript to the answers rendered to these three questions that are all substantially to the same effect. It is this that while it may be permissible for the Court in a given case to choose an utter stranger over a natural guardian, that choice must be exercised with utmost sagacity, care and circumspection, and upon a careful evaluation of the bona fides and circumstances of the stranger; and the decisive and marked poorer prospects of welfare for the minor in the hands or the company of a natural guardian. It should be done in very rare cases.

QUESTION NO. 5

60. The further question formulated on 30.09.2020, which, for the sake of convenience, is referred to as Question No. 5, has been set out in paragraph no. 9 of this judgment. This Court now proceeds to examine Question No. 5.

61. Mr. Anand Kumar Srivastava, learned Counsel for the petitioners, submits that a major wife cannot be entrusted with the custody of a minor husband, who is on the verge of attaining majority and in the age group of expressing his intelligent choice. He submits that this is so, because the welfare of the minor is of paramount consideration. Mr. Srivastava has again reposed faith in the decision of **T. Sivakumar (supra)** and has drawn the Court's attention to paragraph no. 50 of the report, where it is observed :

"50. Nextly, coming to the question whether a minor could be said to have reached the aged of the discretion, we may refer to Section 17(3) of the Guardians and Wards Act which states that one of the matters to be considered by the Court in appointing guardian is, if the minor is old enough to form an intelligent preference, the Court may consider that preference also. Whether a minor has attained the intelligent preference is a question of fact which depends upon the capacity of the minor in each case. It cannot be put in a straight-jacket formula. As per the law laid down by the Hon'ble Supreme Court though the wish of the minor is also a factor to be taken into consideration by the Court while deciding the custody of the minor, it is not the only matter which is to be taken into consideration. Therefore, the minor cannot walk away to her whims and fancies from the lawful guardianship of her parents. At this juncture, we may refer to the Tamil Nadu Juvenile Justice [Care and Protection of Children] Rules, 2001 wherein Rule 18 states as follows:

"18. Orders that may not be passed.--(i) No child shall be ordered to be kept in jail or prison.

(ii) No child shall be sent back to family against the wishes of the child who shall have an evolving capacity to determine the concept."

62. It is urged by the learned Counsel for the petitioners that a perusal of the pleadings would reveal that neither Jyoti, respondent no. 8 nor the second petitioner, Manish Kumar, were 18 years or 21 years old on the date of marriage. It is submitted that the marriage between parties for one is not in accordance with the provisions of Section 5(iii) of the HMA and even if the marriage be not void under the HMA or the PCMA, it is decidedly voidable. He submits that in the event Manish seeks annulment of the marriage under Section 3(1) of the PCMA or

the wife chooses, that course because she too was minor on the date of marriage, it would be a proposition fraught with great risk to entrust the custody of Manish, still a minor, to the wife, who is now a major. This is a situation, according to Mr. Srivastava, that stands on the frail bond of a determinable marriage at the instance of both parties. For these reasons, it would be imprudent to entrust Manish into the care or custody of his wife. So far as the mother-in-law, respondent no. 5 is concerned, she expresses her willingness to accept Manish because of the relationship in which he stands to her daughter. If the relationship between Manish and his wife is no more than a voidable marriage on account of which the wife ought not to be entrusted with Manish's custody, a fortiori the mother-in-law also ought not to be given his custody.

63. Mr. Sudhanshu Kumar appearing for respondent no. 5, on the other hand, submits that Section 6(c) of the Act of 1956, that constitutes a husband the natural guardian of a Hindu married minor girl, is discriminatory in that, that it does not provide the major wife of a Hindu minor boy to be her guardian. It is urged that the provision is utterly discriminatory, as it discriminates on the ground of sex alone. It is violative of Article 15 of the Constitution. Mr. Sudhanshu Kumar is quick to add that instead of the provision being held discriminatory and violative of Article 15, which it certainly would be if read the way it is, the provision ought to be read down by adding the words to Clause (c) of Section 6 to the effect "and in the case of a married boy, the wife, after the word, the husband".

64. Learned Counsel for respondent no. 5 urged that it is always desirable to read down a Statute in a manner that it makes it intra vires, rather than construing it on its plain language and hold it to be ultra vires. In support of this proposition, Mr. Sudhanshu Kumar has placed reliance on the decision of the Supreme Court in **Githa Hariharan (Ms.) and another v. Reserve Bank of India and another**17. He points out that the aforesaid decision also related to interpretation of a provision of the Act of 1956, to wit, Section 6(a), which by the letter of it provides thus :

"**Section 6. Natural guardians of a Hindu minor**.--The natural guardians of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are--

(a) in the case of a boy or an unmarried girl--the father, and after him, the mother:"

65. It is submitted by the learned Counsel that in **Githa Hariharan**, the issue was about construction of the word 'after', occurring in Clause (a) of Section 6 between the words 'and' and 'him', which relegated the mother to a secondary position and made her the minor's guardian, after the lifetime of the father. The principal issue before their Lordships was that Section 4(c) of the Act of 1956 defined natural guardian to mean any of the guardians mentioned in Section 6. This placed the parents at par and if the mother were held to be the natural guardian after the father's lifetime, it would be discrimination between the mother and the father in the matter of their right as natural guardians of the minor, only on the ground of sex. This would have been violative of Articles 14 and 15 of the Constitution. In this context, it was held in **Githa Hariharan** :

"8. Whenever a dispute concerning the guardianship of a minor, between the father and mother of the minor is raised in a court of law, the word "after" in the section would

have no significance, as the court is primarily concerned with the best interests of the minor and his welfare in the widest sense while determining the question as regards custody and guardianship of the minor. The question, however, assumes importance only when the mother acts as the guardian of the minor during the lifetime of the father, without the matter going to the court, and the validity of such an action is challenged on the ground that she is not the legal guardian of the minor in view of Section 6(a) (supra). In the present case, the Reserve Bank of India has questioned the authority of the mother, even when she had acted with the concurrence of the father, because in its opinion she could function as a guardian only after the lifetime of the father and not during his lifetime.

9. Is that the correct way of understanding the section and does the word "after" in the section mean only "after the lifetime"? If this question is answered in the affirmative, the section has to be struck down as unconstitutional as it undoubtedly violates gender equality, one of the basic principles of our Constitution. The HMG Act came into force in 1956, i.e., six years after the Constitution. Did Parliament intend to transgress the constitutional limits or ignore the fundamental rights guaranteed by the Constitution which essentially prohibits discrimination on the grounds of sex? In our opinion -- No. It is well settled that if on one construction a given statute will become unconstitutional, whereas on another construction which may be open, the statute remains within the constitutional limits, the court will prefer the latter on the ground that the legislature is presumed to have acted in accordance with the Constitution and courts generally lean in favour of the constitutionality of the statutory provisions.

10. We are of the view that Section 6(a) (supra) is capable of such construction as would retain it within the constitutional limits. The word "after" need not necessarily mean "after the lifetime". In the context in which it appears in Section 6(a) (supra), it means "in the absence of", the word "absence" therein referring to the father's absence from the care of the minor's property or person for any reason whatever. If the father is wholly indifferent to the matters of the minor even if he is living with the mother or if by virtue of mutual understanding between the father and the mother, the latter is put exclusively in charge of the minor, or if the father is physically unable to take care of the minor either because of his staying away from the place where the mother and the minor are living or because of his physical or mental incapacity, in all such like situations, the father can be considered to be absent and the mother being a recognized natural guardian, can act validly on behalf of the minor as the guardian. Such an interpretation will be the natural outcome of a harmonious construction of Section 4 and Section 6 of the HMG Act, without causing any violence to the language of Section 6(a) (supra)."

66. It is urged by Mr. Sudhanshu Kumar, learned Counsel for respondent nos. 5 and 8, that a similar approach should be adopted here to relieve the Statute of the vice of discrimination on the ground of sex alone and save it from unconstitutionality.

67. Mr. Rajeev Lochan Shukla, learned Amicus Curiae, has submitted that the provisions of Section 6(c) of the Act of 1956, that provide for a Hindu minor girl being subject to the guardianship of her husband, are now redundant in view of the provisions of the PCMA, and more particularly, the decision of the Supreme Court in **Independent Thought**, which has read down Exception (2) to Section 375

IPC by holding that in place of the words, "the wife not being 15 years", the words "the wife not being 18 years" be read. It is urged by Mr. Shukla that in view of the decision of the Supreme Court in **Independent Thought**, a husband being regarded the natural guardian of a Hindu minor wife, would constitute statutory rape. As such, the provisions of Section 6(c) are no more than a dead letter now. It ought to be suitably amended by the legislature to bring it in accord with the prevalent law, that in any case, renders it otiose.

68. This Court has keenly considered the submissions on this question, which is of decisive importance to the event in this case. Though much has been made by the parties about the possibility, the legality or illegality of a minor husband's custody being entrusted to his major wife, so much so that Mr. Sudhanshu Kumar has called in question the vires of Section 6(c) of the Act of 1956, saying that it is discriminatory on the ground of differential treatment based on sex alone, this Court is of opinion that given the present state of laws, much of those issues really do not arise. The question about the provisions of Section 6(a) being discriminatory, inasmuch as it provides for the husband being the natural guardian of a minor Hindu wife, but not vice versa, urged by Mr. Sudhanshu Kumar with great vehemence, is indeed attractive and not entirely without substance. But, in the opinion of the Court, the way the law has now moved on, that provision of the Act of 1956 has become otiose and unenforceable because of the operation of certain other statutes, like the Act of 2012 and the decision of the Supreme Court in **Independent Thought**. This Court must also place on record here that the submission of Mr. Sudhanshu Kumar that Section 6(c) ought to be read down on the same lines as done in **Githa Hariharan** by the Supreme Court is slightly misplaced. In **Githa Hariharan** the Court did not apply the doctrine of reading down, but brought about a harmonious construction of the provisions of Sections 4(c) and 6(a) of the Act of 1956.

69. It is true, no doubt, that the purpose of the harmonious construction in **Githa Hariharan** was ultimately to save the Statute from unconstitutionality, which was apparent, if it was read in any other manner, but to this Court's understanding the doctrine of reading down was not applied. These remarks, though again academic, the Court is compelled to make, because in the present case, there is no challenge laid to the vires of the provisions of Section 6(c) of the Act of 1956 by any of the parties, where the Court may have considered reading down the provision, instead of striking it down, if a case of constitutionally prohibited discrimination were ultimately established. In any case, that question does not seem to arise here. The reason is that Section 6(c) of the Act of 1956 appears to be a rudimentary provision, that was enacted in a different world and in a different social order. It was a time when going by the norms prevalent in society, much younger girls were married to older boys. Some of the girls would not qualify as major under the Indian Majority Act, 1875 as they would be less than 18 years and still regarded old enough by the prevalent social values to be married. It was in that context that the provisions of Section 6(c) were enacted, which were happily placed with the Penal provisions in the Code, where, according to Exception (2) to Section 375 "Sexual intercourse or sexual acts by a man with his own wife, the wife being not under 15 years of age, is not rape". Thus, Exception

(2) excluded sex with a wife, who was not under 15 years of age, from the purview of statutory rape, though the definition of rape otherwise provides that any of the acts of sex mentioned in Clauses (a) to (d) of Section 375, if done by a man, with or without the woman's consent, when she is under 18 years of age, would be rape.

70. The contemporaneous provisions of Section 6(a) and Exception (2) to Section 375 IPC would show that at the point of time when Section 6(c) was enacted, it was widely acceptable in society for a minor girl, not below the age of 15, to be married to a major husband. The provisions in the CMRA were also to similar effect. The CMRA was enacted in the year 1929, and the Statute, as originally enacted, provided the minimum legal age for a girl's marriage as fourteen years. It was raised to fifteen years by Amending Act no.41 of 1949. It was further raised to eighteen years by the Child Marriage Restraint (Amendment) Act, 1978. The Act of 1956 was enacted when the CMRA provided the minimum legal age for a girl's marriage as fifteen years. The provisions of Section 6(c) were enacted in that context and have not been legislatively rectified to bring it in accord with the law, as it now stands. In the present time and as the law has evolved, there is no scope for Section 6(c) of the Act of 1956 to be an operative clause of the law any more.

71. Dilating on the effect of the Act of 2012 in relation to sex with a child, as defined there, it has been held by the Supreme Court in **Independent Thought** :

"189. Section 42-A of the Pocso Act has two parts. The first part of the section provides that the Act is in addition to and not in derogation of any other law. Therefore, the provisions of the Pocso Act are in addition to and not above any other law. However, the second part of Section 42-A provides that in case of any inconsistency between the provisions of the Pocso Act and any other law, then it is the provisions of the Pocso Act, which will have an overriding effect to the extent of inconsistency. The Pocso Act defines a "child" to be a person below the age of 18 years. "Penetrative sexual assault" and "aggravated penetrative sexual assault" have been defined in Section 3 and Section 5 of the Pocso Act. Provisions of Sections 3 and 5 are by and large similar to Section 375 and Section 376 IPC. Section 3 of the Pocso Act is identical to the opening portion of Section 375 IPC whereas Section 5 Pocso Act is similar to Section 376(2) IPC. Exception 2 to Section 375 IPC, which makes sexual intercourse or acts of consensual sex of a man with his own "wife" not being under 15 years of age, not an offence, is not found in any provision of the Pocso Act. Therefore, this is a major inconsistency between the Pocso Act and IPC. As provided in Section 42-A, in case of such an inconsistency, the Pocso Act will prevail. Moreover, the Pocso Act is a special Act, dealing with the children whereas IPC is the general criminal law. Therefore, the Pocso Act will prevail over IPC and Exception 2 insofar as it relates to children, is inconsistent with the Pocso Act.

Is the Court creating a new offence?

190. One of the doubts raised was if this Court strikes down, partially or fully, Exception 2 to Section 375 IPC, is the Court creating a new offence. There can be no cavil of doubt that the courts cannot create an offence. However, there can be no manner of doubt that by partly striking down Section 375 IPC, no new offence is being created. The offence already exists in the main part of Section 375 IPC as well as

in Sections 3 and 5 of the Pocso Act. What has been done is only to read down Exception 2 to Section 375 IPC to bring it in consonance with the Constitution and the Pocso Act.

191. In this behalf, reference may be made to some English decisions. In England, there was never any such statutory exception granting immunity to the husband from the offence of marital rape. However, Sir Mathew Hale, who was Chief Justice of England for five years prior to his death in 1676, was credited with having laid down the following principle:

"But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband which she cannot retract."

192. The aforesaid principle, commonly known as Hale's principle, was recorded in The History of the Pleas of the Crown [(1736) Vol. 1, Ch. 58, p. 629] and was followed in England for many years. Under Hale's principle a husband could not be held guilty of raping his wife. This principle was based on the proposition that the wife gives up her body to her husband at the time of marriage. Women, at that time, were considered to be chattel. It was also presumed that on marriage, a woman had given her irrevocable consent to have sexual intercourse with her husband.

193. The aforesaid principle was followed in England for more than two centuries. For the first time in R. v. Clarence [R. v. Clarence, (1888) LR 22 QBD 23 (CCR)] , some doubts were raised by Wills, J. with regard to this proposition. In R. v. Clarke [R. v. Clarke, (1949) 2 All ER 448] , Hale's principle was given the burial it deserved and it was held that the husband's immunity as expounded by Hale, no longer exists. Dealing with the creation of new offence, the House of Lords held [R. v. R., (1992) 1 AC 599, p. 616 : (1991) 3 WLR 767 : (1991) 4 All ER 481 at p. 484 (HL)] as follows: (R. case [R. v. R., (1992) 1 AC 599, p. 616 : (1991) 3 WLR 767 : (1991) 4 All ER 481 at p. 484 (HL)] , AC p. 611E)

"The remaining and no less difficult question is whether, despite that view, this is an area where the court should step aside to leave the matter to the parliamentary process. This is not the creation of a new offence, it is the removal of a common law fiction which has become anachronistic and offensive and we consider that it is our duty having reached that conclusion to act upon it."

194. In my view, as far as this case is concerned, this Court is not creating any new offence but only removing what was unconstitutional and offensive.

Relief

196. Since this Court has not dealt with the wider issue of "marital rape", Exception 2 to Section 375 IPC should be read down to bring it within the four corners of law and make it consistent with the Constitution of India.

197. In view of the above discussion, I am clearly of the opinion that Exception 2 to Section 375 IPC insofar as it relates to a girl child below 18 years is liable to be struck down on the following grounds:

(i) it is arbitrary, capricious, whimsical and violative of the rights of the girl child and not fair, just and reasonable and, therefore, violative of Articles 14, 15 and 21 of the Constitution of India;

(ii) it is discriminatory and violative of Article 14 of the Constitution of India; and

(iii) it is inconsistent with the provisions of the Pocso Act, which must prevail.

Therefore, Exception 2 to Section 375 IPC is read down as follows:

"Exception 2.--Sexual intercourse or sexual acts by a man with his own wife, the wife not being 18 years, is not rape."

It is, however, made clear that this judgment will have prospective effect.

198. It is also clarified that Section 198(6) of the Code will apply to cases of rape of "wives" below 18 years, and cognizance can be taken only in accordance with the provisions of Section 198(6) of the Code. (Emphasis by Court)

72. The decision in **Independent Thought** leaves no scope for a minor girl now to be lawfully married or permitted any kind of matrimonial alliance, even a live-in-relationship with a major, or for that matter, a minor man. This being so, the provisions of Section 6(c) of the Act of 1956, that have regarded the husband as the natural guardian of a minor Hindu wife, have truly become otiose and a dead letter. This change in the law is the outcome of the way social values have evolved and if the decision of their Lordships in **Independent Thought** is looked into, it is eloquent on a similar evolution and change of values in England, where it speaks about the Hales Principle and its decimation in R v Clarke, (1949) 2 All ER 448.

73. Now, just as there cannot be the case of a minor Hindu wife being married to a major and the husband regarded as her natural guardian under Section 6(c) of the Act of 1956, the Act of 2012 similarly works to prohibit sex between a man, who is a minor and a woman, who is a major. If Section 3 is carefully seen, the offence of penetrative sexual assault is gender neutral, and has for its subject, a child. Section 2(d) defines a child to mean any person below the age of 18 years. The offence defined under Section 3 together with the penal clause under Section 4, would be attracted to the case of a person, who commits penetrative sexual assault as defined under Section 3, irrespective of the offender's age or sex. Therefore, a minor, who commits an assault on another child, would be equally liable. The same position obtains in the case of an offence as defined under Section 7 and punishable under Section 8 of the POCSO Act.

74. It has already been held in **Independent Thought** and truly those are the clear words of Section 42-A of the Act of 2012 also, that the provisions of the Act have overriding effect over the provisions of any other law, in case of any inconsistency, to the extent of it. Therefore, the mere fact that the marriage is not void under the PCMA, or that Section 9 makes a male above 18 years of age liable to punishment, if he contracts a child marriage, but not a female above 18 years of age, likewise liable, would not make any difference. A female, who is a major, if she were permitted to marry, or more particularly, consummate marriage with a child, would be liable under Section 3/4 of the Act of 2012, subject, of course, to the charge being established at the trial, after a prosecution is instituted.

75. Here, if Manish, who is still below the age of 18, were to be placed in the custody of his wife, respondent no. 8, it would be virtually sanctioning the imminent commission of the offence under Section 3/4 of the Act of 2012, or the other penal provisions of the said Statute. Therefore, to entrust the minor Manish Kumar to the custody of his major wife, would not only be patently illegal, but virtually permitting an offence under the Act of 2012, in violation of the interest of the child that the said Statute is designed to protect. If that were done, by application of

no principle or yardstick, can it be regarded as an option that would secure the welfare of the minor.

76. The fifth question is answered in the **negative** and it is held that a wife, who is a major, cannot be entrusted the custody of her minor husband, where the marriage is voidable for reason that entrusting a minor husband's custody to a major wife, would be sanctioning cohabitation between an adult/major and a child - an offence under Section 3/4 or 7/8 of the Act of 2012. The custody or care of a minor, that inherently makes or has the potential of making the minor the victim of an offence and his adult guardian an offender under the Act of 2012, cannot be regarded as a custody or arrangement made to ensure the welfare of the minor.

77. The conclusion would, therefore, be that the petitioner, Manish Kumar, shall stay in a State Facility, like a Protection Home or a Safe Home or a Child Care Institution, other than an institution meant for delinquents or a Correction Home, until Manish attains the age of 18 years, that is to say, 04.02.2022 (according to Manish's recorded date of birth in his High School Certificate). On 04.02.2022, Manish shall be set free to go wherever he wants and stay with whomsoever he likes, including his wife, Smt. Jyoti, respondent no. 8 and her family. This arrangement has been made considering Manish's stand before this Court on 23.09.2020 and maintained throughout the proceedings, where he said that he does not want to go back to his mother, Haushila Devi, petitioner no.2. If for any reason before 04.02.2022, Manish desires to go back to his mother, petitioner no. 2, it will be open to him, through an official of the Home where he is housed, to make an application for the purpose to the Child Welfare Committee, appointed under the Act of 2012. He will then be produced before the Child Welfare Committee, who will ascertain his stand in the matter by recording his statement viva voce. If Manish's stand is clear that he wishes to go back to his mother during the period of his minority and the Child Welfare Committee are satisfied that it is a voluntary statement, Manish shall be permitted to go back to his mother and shall stay there until he attains the age of 18 years. After that Manish would be free to go wherever he likes and stay with whomsoever he wants, including his wife.

78. In the result, this Habeas Corpus Writ Petition **succeeds** and stands ***allowed.*** The rule nisi is, therefore, made **absolute** in terms of the above orders.

79. There shall, however, be no order as to costs.

80. Mr. Rajeev Lochan Shukla, Advocate, who consented to assist the Court as an Amicus Curiae, rendered invaluable assistance to the Court in dealing with the subtle issues involved and the rights of parties, doing so through the rather prolonged hearing in the case, where he took time out of his busy schedule to assist the Court. Likewise, this Court must also place on record its gratitude to Mr. Ashutosh Yadav, Advocate, who also assisted the Court on our request as an Amicus Curiae and was of immence help, particularly on certain vexed issues. Mr. Sudhanshu Kumar, learned Counsel appearing for respondent no. 5, was appointed by the Court to appear on behalf of the said respondent, inasmuch as both respondent nos. 5 and 8 expressed their inability to engage Counsel to represent them. Mr. Sudhanshu Kumar was,

therefore, nominated by the Court from the Panel of Lawyers maintained by the High Court Legal Services Committee, High Court, Allahabad to appear on behalf of respondent nos. 5 and 8. It must be placed on record that Mr. Sudhanshu Kumar rendered both invaluable and enthusiastic assistance throughout the hearing. This Court must record its appreciation that Mr. Sudhanshu Kumar very ably discharged his brief to the great advantage of this Court. He will be entitled to receive in fee a consolidated sum of Rs. 15,000/- from the High Court Legal Services Committee, High Court Allahabad.

81. Let this order be communicated to respondent nos. 2 to 8, the Child Welfare Committee, Azamgarh, and the Superintendent of the State Facility or Safe Home, where the minor is/shall be housed, through the Chief Judicial Magistrate, Azamgarh by the Joint Registrar (Compliance). Let a copy of this order be also communicated to the Secretary, High Court Legal Services Committee, High Court, Allahabad by the Joint Registrar (Compliance).

(2021)06ILR A482
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.12.2020

BEFORE

THE HON'BLE SUNEET KUMAR, J.

Habeas Corpus Writ Petition No. 467 of 2020

Saksham Pathak ...Petitioner
Versus
Vishal Dubey & Ors. ...Respondents

Counsel for the Petitioner:
Sri Shambhavi Shukla, Sri Dileep Kumar (Senior Adv.), Sri Rajrshi Gupta, Sri Rizwan Ahmad

Counsel for the Respondents:
Sri Sunil Kumar Singh, Sri Anil Kumar Srivastava (Sr. Advocate), Sri Sunil Kumar Singh, Sri Prem Narayan Singh, Sri Rahul Shukla

Corpus is four year old-mother died a natural death-father is in transferable job-corpus was regularly visiting his native village along with her maternal aunt and at times resides at her place-father re-married and claims the custody of his child-but denied by respondent maternal family-parents given priority for custody-second marriage does not disentitle a parent to the custody.

W.P. allowed. (E-8)

List of Cases cited:

1. Gohar Begum Vs Suggi @ Nazma Begum & ors., AIR 1960 SC 93

2. Syed Saleemudding Vs Dr. Ruksana & ors., 2001(5) SCC 24

3. Dr. Veena Kapoor Vs Varinder Kumar Kapoor, AIR 1982 SC 795

4. Rajiv Bhatia Vs Government of NCT of Delhi & ors., AIR 1999 SC 3284

5. Tejaswini Gaud Vs Shekhar Jagdish Prasad Tewari, (2019) 7 SCC 42

6. Sheoli Hati Vs Somnath Das, (2019) 7 SCC 490

7. Gaurav Nagpal Vs Sumedha Nagpal, (2009) 1 SCC 42

8. Surindar Kaur Sandhu Vs Harbax Singh Sandhu, (1984) 3 SCC 698

9. Nil Ratan Kundu Vs Abhijit Kundu, AIR 2009 SC (Supp) 732

10. Mausami Moitra Ganguli Vs Jayanti Ganguli, (2008) 7 SCC 673

11. Gaytri Bajaj Vs Jiten Bhalla, (2012) 12 SCC 471

12.Mamta Vs Ashok Jagannath Bharuka, (2005) 12 SCC 452

13. Rosy Jacob Vs Jacob A. Chakramakkal, AIR 1973 SC 2090

14. Kirtikumar Maheshankar Joshi Vs Pradipkumar Karunashanker Joshi, AIR 1992 SC 1447

15. Ather Hussain Vs Syed Siraj Ahmad, (2010) 2 SCC 654

16. Lekha Vs P Anil Kumar, decided on 21 November 2006, passed in Appeal (Civil) No. 5131 of 2006

17. Sura Reddy Vs Chenna Reddy, AIR 1950 Mad 306

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

1. Heard Shri Dilip Kumar, learned Senior Counsel assisted by Sri **Rizwan Ahmad**, learned counsels for the petitioner and Shri Anil Kumar Srivastava, learned Senior Counsel assisted by Shri Rahul Shukla, learned counsels for the respondents.

2. The instant petition has been filed for custody of the corpus (Saksham Pathak) through Amit Kumar Pathak (father)1. The corpus is in the custody of the respondents.

3. The facts giving rise to the instant petition filed for writ of habeas corpus is that A-1 is the only natural and legal guardian of the corpus aged about four years. A-1 is in the employment of Central Reserve Police Force2; he came to be married to Archana, daughter of Sri Vinod Dubey, on 31 January 2013. After marriage, wife of A-1 started living at the matrimonial house at village Merhi Dudhi, Tehsil, Bharthana, district Etawah. A-1, at intervals, used to visit his native village on leave being sanctioned by the CRPF. From the wedlock, corpus was born on 02 October 2016, at Etawah. In the process of delivery, Archana's physical condition became critical, she was shifted to Intensive Care Unit (I.C.U.), and was diagnosed of cardiac disorder by the attending doctors, she was advised to take treatment from a specialist. On 23/24 November 2016, Archana was brought by her brother (second respondent) to consult Heart Specialist at district Ujjain (Madhya Pradesh) at her home district. Thereafter, Archana was shifted for consultation and treatment to Rhythm Heart Institute, Vadodara, Gujarat, on 5 August 2017, by A-1 and her brother (second respondent). On improvement, Archana returned to her matrimonial home and continued treatment, however, on 11 October 2018, she succumbed to a massive heart stroke. At the relevant time, A-1 was posted at Meerut and was taking training for United Nation Mission, being a regular constable of 217 Battalion, Chhattisgarh. A-1 participated in the funeral of Archana at his native village. Archana's mother, brother and two sisters i.e. second to fifth respondents participated in the funeral.

4. It is urged by the learned counsel for the petitioner that the fourth respondent Sapna Dubey, aged about 27 years, continued to stay at the matrimonial home of Archana on the pretext that she would be able to look after the infant child being his mausi. It appears, thereafter, in January 2019, the fourth respondent along with the corpus returned to Ujjain on the pretext that the grand mother (nani) wanted to meet and see the child. It is urged that in March, during Holi, A-1 went to take the corpus back to his native village, but on the request of his in-laws he left the corpus there and directly went to his place of posting at Meerut after exhausting his

leave. In the month of September 2019, A-1 again visited his native village and requested his in-laws to bring back his son during the leave period. It appears that the corpus was regularly visiting the native village of A-1 along with the fourth respondent and at times was residing at district Ujjain, as A-1 was not available having regard to the nature of his duty. On 5 November 2019, A-1 came to be posted at 139 Battalion at Delhi. At that relevant time the fourth respondent along with the corpus was at the native village of A-1 at district Etawah. It appears that the fourth respondent desired to live with the corpus and marry A-1 as she would be the most appropriate person to look after the infant child.

5. It is submitted that the desire of marriage by the respondents was expressed at a time when the second marriage proposal of A-1 with Varsha was at a mature stage. Varsha is a well educated lady and her parents had agreed for the second marriage and also to look after the child. The fact that the marriage negotiations of A-1 with Varsha was going on and was at a mature stage was fully known to the fourth respondent and the other in-laws.

6. It is submitted that during this point of time the corpus was forcefully taken away by the second and fourth respondents from the custody of A-1 and his family members, thereafter, the respondents insisted and pressurized that A-1 should marry the fourth respondent. Finally, on 30 June 2020, during the pandemic Covid-19 the marriage of A-1 was solemnized with Varsha, daughter of Pradeep Kumar at Etawah. The function was kept low profile due to restriction during lockdown. It is submitted that the in-laws of A-1 (respondents except respondent no. 1) had also attended the marriage ceremony. It is further submitted that the second, fourth and fifth respondents are unmarried, the first respondent, the eldest brother-in-law of A-1 was married, but has since been convicted for the murder of his wife by the Additional Sessions Judge, Nagda, District Ujjain, under section 302 Indian Penal Code (I.P.C.), whereas, the second, fourth and fifth respondents though charged for the offence were acquitted. First respondent is facing life term.

7. In this backdrop, it is submitted by learned counsel for the petitioner that corpus is in the illegal detention/custody of the respondents, who admittedly are not the natural guardian. A-1, having due regard to the nature of his duty, has since been posted at Delhi and being the only natural guardian is entitled to the custody of the corpus. The child has been removed against the wishes of A-1 and his family by the fourth respondent.

8. The respondents have put in appearance and filed counter affidavit. It is submitted that first and second respondents are maternal uncle (mama) of the corpus, the third respondent is grandmother (nani), whereas, fourth and fifth respondents are mausi of the corpus and reside at Nagda, district Ujjain. It is further stated that the second, fourth and fifth respondents are unmarried, whereas, the first respondent was earlier married to Pinki, but thereafter the first respondent has not remarried. It is further stated that Archana, the sister of first, second, fourth and fifth respondents, was married to A-1 and the corpus was born from the wedlock at district Etawah (Uttar Pradesh). Archana, unfortunately, died on 11 November 2018, at her in-laws place. It is further stated that after the ritual on the death of their sister (Archana) the custody of the child was handed over by A-

1 to the respondents. It is further stated that since then the corpus is residing with the respondents and they are looking after his welfare. A-1, nor his family members, ever inquired about the well being of the corpus. It is further submitted that the corpus, presently is aged about 4 years, and has been admitted to a play school, namely, Rising Kids Play School, Nagda, Ujjain. It is pleaded that since 11 November 2018, A-1 never visited the house of the respondents nor inquired about the child. It is further stated that once or twice the fourth respondent went and stayed at the native village of A-1 along with the corpus but after a couple of days she returned with the corpus. It is further submitted that corpus is happy and willing to stay with the respondents, further, the corpus treats the forth respondent as his mother and addresses her as "Archana'. It is further submitted that the second respondent is a manager of a company at Ujjain and earns at Rs. 25000/- per month; the fifth respondent is working as Primary Teacher in Lakshya International School at Ujjain. It is further stated that the corpus is the only child in the family of the respondents and all the respondents jointly take care of the welfare of the child. The fourth respondent undertakes to take the responsibility of the corpus.

9. It is alleged that A-1 never took care of his wife nor did he bear the expenses of the treatment of his wife. It is admitted that the respondents participated in the last rites of Archana, thereafter, returned to Ujjain with the minor child. It is further admitted that the first respondent was convicted for the murder of his wife by the competent court on 10 July 2019 and sentenced to life imprisonment. It is submitted that A-1, having due regard to the nature of his employment and duty, is not in a position to look after the corpus, further, welfare of the child will be seriously neglected after the second marriage of A-1.

10. Rival submissions fall for consideration.

11. The question that falls for consideration is whether the writ of habeas corpus filed by the father (A-1) of the corpus is entitled to seek custody of the minor child from the respondents. Further question falling for consideration is whether handing over the custody of the child to A-1 is not conducive to the interest and welfare of the minor child.

12. It would be apposite to briefly examine the law with regard to the custody of the minor child in a petition seeking writ of habeas corpus.

A. Scope of Habeas Corpus Petition:

13. Guardians and Wards Act, 1890, is a secular law regulating questions of guardianship and custody for all children, irrespective of their religion. Hindu Minority and Guardianship Act, 1956, is applicable to persons who is a Hindu, Buddhist, Jain or Sikh by religion. Hindu Marriage Act, 1956, authorises courts to pass interim orders in any proceedings thereunder, with respect to custody, maintenance and education of minor children.

14. The term "custody' is not defined in any Indian Family Law, whether secular or religions. The law governing custody is closely linked with that of guardianship. As against guardianship, the term custody is a narrower concept relating to the upbringing and day-to-day care and control of the

minor. Guardianship refers to a bundle of rights and powers that an adult has in relation to the person and property of a minor.

15. The writ of habeas corpus is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from illegal or improper detention. The writ also extends to restore the custody of a minor to his guardian when wrongfully deprived of it. For restoration of the custody of a minor from a person who according to the personal law, is not his legal or natural guardian, in appropriate cases, the writ court has jurisdiction.

16. It is well established that in issuing the writ of habeas corpus in the case of infants, the jurisdiction which the court exercises is an inherent jurisdiction as distinct from statutory jurisdiction conferred by any particular provision in any special statute. In other words employment of the writ of habeas corpus in child custody cases is not pursuant to, but independent of statute.

17. In **Gohar Begum vs. Suggi @ Nazma Begum and others**3, the Supreme Court in the matter of custody by the unwed mother of her illegitimate child had directed that the person detaining the child had no legal right to the custody and her refusal to make over the child to the mother resulted in an illegal detention of the child. The Court held that the fact that the mother had a right to take remedy under the Guardians and Wards Act, 1890, is no justification for denying her right of seeking legal custody, being the natural guardian, she is entitled to maintain the writ petition. The Court held that the dispute as to the paternity of the child is irrelevant. (Refer- **Syed Saleemudding Versus Dr. Ruksana and other**4)

18. In cases where disputed questions of fact are involved either between the natural guardians or any other person, the Court has been reluctant in interfering in writ jurisdiction.

19. In **Dr. Veena Kapoor vs. Varinder Kumar Kapoor**5, the issue of custody of child was between natural guardians who were not living together. The Supreme Court directed that District Judge concerned to take down evidence, adduced by the parties and sent report to the Supreme Court on the question whether considering the interest of the minor child, its mother should be given custody.

20. In **Rajiv Bhatia vs. Government of NCT of Delhi and others**6, the habeas corpus petition was filed by the mother of a girl child, alleging that her daughter was in illegal custody of her husband's elder brother. The elder brother relied on an adoption deed. The plea taken by the mother in the Supreme Court that it was a fraudulent document. In the given facts, Supreme Court held that the High Court in writ jurisdiction was not entitled to examine the legality of the deed of adoption and then come to a conclusion one way or the other with regard to the custody of the child.

21. Habeas corpus proceedings is not to justify or examine the legality of the custody. The proceeding is a medium through which the custody of the child is addressed to the discretion of the Court. Habeas corpus is a prerogative writ which is an extraordinary remedy and the writ is issued wherein the circumstances of the particular case, ordinary remedy provided

by the law is either not available or is ineffective; otherwise a writ will not be issued. In child custody the power of the High Court in granting writ is qualified only in cases where the detention of a minor by a person who is not entitled to his legal custody. In child custody matters, the writ of habeas corpus is maintainable in exceptional cases where it is proved that the detention of the minor child by a parent or others was illegal and without any authority of law. (**Refer-Tejaswini Gaud Versus Shekhar Jagdish Prasad Tewari**7).

22. In child custody matters, ordinary remedy lies only under the Hindu Minority and Guardianship Act, 1956, or the Guardians and Wards Act, 1890, as the case may be. There are significant differences between the enquiry under the Guardians and Wards Act, 1890, and the exercise of powers by the writ Court which is of summary in nature. What is important is the welfare of the child. In the writ Court, rights are determined only on the basis of affidavits. Where the Court is of the view that a detailed enquiry is required the Court may decline to exercise extraordinary jurisdiction and direct the authorities to approach the competent Civil Court/Family Court. It is only in exceptional cases the rights of the parties to the custody of the minor will be determined and exercised in extraordinary jurisdiction on a petition of habeas corpus.

B. Welfare-Paramount Consideration:

23. Paramount consideration regarding custody or other issues pertaining to a child is "welfare of the child'. It is not the welfare of the father, nor welfare of the mother or guardian. It is the welfare of the minor and minor alone, irrespective of the claims of the parties to the custody. **(Refer-Sheoli Hati vs Somnath Das**8)

24. The expression "welfare' used in the statute has to be construed literally and must be taken in its widest sense. The moral and ethical welfare of the child must also weigh with the Court, as well as, its physical well being. Though the provisions of the special statutes which govern the rights of the parents or guardians may be taken into consideration, there is nothing which can stand in the way of the Court exercising its parens patriae (supreme guardian/protector) jurisdiction arising in such cases. However, legitimate the claims of the parties are, they are subject to the interest and welfare of the child. (**Refer-Gaurav Nagpal Versus Sumedha Nagpal9, Surindar Kaur Sandhu vs Harbax Singh Sandhu**10)

25. In **Nil Ratan Kundu vs. Abhijit Kundu**11, Supreme Court held that the paramount consideration in custody of the child is welfare of the minor and not the legal right of the particular party. Section 6 of the Hindu Minority and Guardianship Act, 1956, cannot supersede the dominant consideration as to what is conducive to the welfare of the minor child. The custody cases cannot be decided on documents, oral evidence or proceeds without reference to "human touch". The human touch is the primary consideration for the welfare of the minor, since other materials may be created either by the parties themselves or on the advice of counsels to suit their convenience.

26. A court of law should keep in mind relevant statutes and the rights flowing therefrom. But such cases cannot be decided solely by interpreting legal

provisions. A Court while dealing in such matters is neither bound by the statute nor by strict rules of evidence or procedure nor by the precedents. In selecting proper guardian of a minor the court is exercising parens patriae jurisdiction and is expected and bound to given due weight to child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. They are equally, or even more important, essential and indispensable consideration. If the minor is old enough to form an intelligent preference or judgment, the court must consider such preference as well, though the final decision should rest with the Court as to what is conducive to the welfare of the minor. (**Refer: Mausami Moitra Ganguli vs. Jayanti Ganguli**12)

27. It is not the better right of either parent that would require adjudication while deciding their entitlement to custody. The desire of the child coupled with the availability of a conducive and appropriate environment for proper upbringing together with the ability and means of the parent concerned to take care of the minor are some of the relevant factors that have to be taken into account by the court while deciding the issue of custody of a child, irrespective of the rights conferred under the statutory provisions or the personal laws. (**Refer-Gaytri Bajaj Versus Jiten Bhalla13 and Mamta Versus Ashok Jagannath Bharuka**14)

28. In **Rosy Jacob vs. Jacob A. Chakramakkal**15 Supreme Court held that the principle on which the court should decide the fitness of the guardian mainly depends on two factors: (i) the father's fitness or otherwise to be the guardian, and (ii) the interests of the minors. The children are not mere chattels; nor are they mere play-things for their parents. Absolute right of parents over the destinies and the lives of their (minor) children has, in the modern changed social conditions, yielded to the considerations of their welfare as human beings so that they may grow up in a normal balanced manner to be useful members of the society.

29. In **Kirtikumar Maheshankar Joshi vs. Pradipkumar Karunashanker Joshi**16, the father of the children was facing charge under Section 498A IPC and the children expressed their willingness to remain with their maternal uncle who was looking after them very well and the children expressed their desire not to go with their father. The Supreme Court found the children intelligent enough to understand their well-being and in the circumstances of the case, handed over the custody to the maternal uncle instead of their father.

C. Discussion & Conclusion:

30. Having briefly examined the law pertaining to custody of minor child, I would now revert to the facts of the instant case.

31. The facts, inter se, parties are not in dispute. The rights of the contesting parties can be determined on the basis of affidavits. The Court in the given facts is not required to make a detailed enquiry in the backdrop of the facts detailed in the earlier part of the order. I am of the view that the writ of habeas corpus is maintainable.

32. A-1 father of the corpus is the natural guardian of the child. The

respondents are in-laws of A-1 and are not the natural guardians. The natural guardian is pitted against a third party. In other words the child is in illegal detention of the respondents. The onus, therefore, is upon the respondents to prove as to why it is not conducive to the welfare and interest of the child in handing over the custody to A-1.

33. The point to be considered is the custody of the minor child which solely rests upon the welfare/best interest of the child. The legal rights of the contesting parties, including, the parent would not bind the Court. It is admitted to the respondents that A-1 is the father of the child born from the deceased Archana-sister/brother/daughter of the respondents. The child presently is aged about four years. A-1 is gainfully employed with the CRPF. He has contracted second marriage with Varsha.

34. A-1 is presently posted at Delhi. The first respondent is a convict facing life term for murder of his wife. The second, fourth and fifth respondents are unmarried; second and fifth respondents are gainfully employed, whereas, the fourth respondent is unemployed. The corpus is the only child amongst the respondents, probably for this reason they feel attached to the minor child. The child has recently been admitted to a play-way pre-school by the respondents. The child appears to be attached to the fourth respondent and addresses her as his mother.

35. The respondents, barring, the third respondent (nani) are present in the Court. The first respondent is on parole to attend the proceedings. The respondents have produced the child, pursuant to the direction of the Court. A-1, Varsha and grand mother (dadi of the corpus) are also present.

36. The respondents press for the custody of the child stating that the welfare of the child would be compromised and neglected by A-1 having regard to the transferable nature of employment; coupled with the fact that A-1 has contracted second marriage. In other words, the child would be neglected by the "step mother'. The fourth respondent made a statement, in the presence of the respective counsels, that the child should continue in her custody until the child attains the age of ten years. The respondents would take joint care of the child in all respect. The child thereafter could decide whether he wants to return to his father or continue to stay with the respondents. The fourth respondent on specific query admits that she does not have any legal right to the custody of the child but states that the welfare of the child, in the best interest, would be subserved with the respondents. The child has been in their custody for two years.

37. A-1 is able bodied, employed with the Central Paramilitary Force, he has the means and source to provide education to his child. A-1 comes from a large joint family having agricultural property. The child after the demise of his mother was taken care by the family at their native village at Etawah. The child is intelligent, of happy disposition and agile. The child could write his name and that of his pre-school. The child has been taken care well by the respondents, by admitting him to a school recently, but that is not sufficient to claim custody. The moral and ethical values cannot be ignored. On query, the child could immediately spot his father in the crowded court. He readily went to his father and stayed with him throughout the proceedings. The child is familiar and attached to his father. It appears that the child has been in continuous touch with his

father and his family as against the claim of the respondents. He identified his grandmother (dadi) in the Court.

38. It is not the case of the respondents that A-1 suffers from any vice that is detrimental to the interest of the child, or A-1 has indulged in domestic violence, or is not sensitive to the needs of the child, or is not responsive parent, or has a history of child abuse, substance abuse or suffers from psychiatric illness, or has any social issues with the child that would negatively impact the child. In contrast the child is comfortable with the father, he is not afraid of the parent and feels secure in his arms as is evident from his demeanour.

39. The law gives priority to parents where it comes to the custody of their children. However, another person (third person) can go to the Court and ask for custody. This kind of request for custody is not always related to bad behaviour by the parents. Some times, the child's well being requires a third person to have custody. The third person who wants custody must prove to the Court that this is in the interest of the child. This is not easy thing to do because the parents are often in the best position to ensure the well-being of their children. The third person must convince the court that the opposite is true. In the given facts, in particular, conviction of the first respondent for a heinous offence, the respondents have miserably failed to, prima facie, prove/show that the welfare of the child would seriously be jeopardised in the event of the custody being handed over to A-1. The plea that the child should continue in the custody with the respondent for the next six years is without any basis.

40. The learned counsel for the respondents finally submitted that the second marriage of A-1 would not be in the best interest of the child. The step mother is likely to ignore the child. The argument sought to be advanced is based on assumption without any foundation being laid to that effect.

41. Second marriage does not disentitle a parent to the custody of the child, though, the second marriage of either of the parent is a factor to be considered while granting custodial rights. (**Refer-Ather Hussain Versus Syed Siraj Ahmad**17)

42. In **Lekha Versus P Anil Kumar**18 Supreme Court held that remarrige of the mother cannot be taken as a ground for not granting the custody of the child to the mother. The paramount consideration should be given to the welfare of the child. The Court referred to the decision of the Madras High Court in **Sura Reddy Versus Chenna Reddy**19, wherein the court clearly laid down that a Hindu father has married a second wife is no ground whatsoever for depriving him of his parental right of custody. The father ought to be the guardian of the person and property of the minor in ordinary circumstances.

43. Having regard to the facts, circumstances and the material placed on record, the custody of the child cannot be permitted to continue any further with the respondents (third party). The respondents accordingly are directed to handover the child to A-1 (natural guardian) forthwith. To foster love and affection of all the family members, the respondents, except the first respondent, would have visiting right to meet and interact with the child at regular intervals preferably bimonthly at the place where the child resides on prior information to the parent of the child.

44. The writ petition is allowed.

(2021)06ILR A491
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.06.2021

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE PRADEEP KUMAR SRIVASTAVA, J.

Habeas Corpus Writ Petition No. 1160 of 2019

Kiranpal @ Kinna ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Santosh Yadav, Sri Saurabh Yadav

Counsel for the Respondents:
G.A.

Petitioner was minor-at time of incident-defence of juvenility raised after conviction -no appeal to Supreme Court-approached JJ Board-declared minor on the basis of ossification test-detention not illegal-order of age determination not sustainable.

Held, *No doubt the standard of proof for age determination is the degree of probability and not proof beyond doubt. But the determination of age, in a given case, has to be made keeping in mind the object of the benevolent legislation, the Juvenile Justice Act, that all persons who were juvenile on the date of commission of offence should be given benefit of the Act but those who are taking plea of minor as a plea of alibi should be shown the doors at the threshold. It is settled legal position that all scrupulous claims of juvenility should be thrown at the threshold and genuine claims should be examined with a liberal approach. No doubt that a hyper technical approach in the matter of enquiry would result in miscarriage of justice but a casual or cavalier approach in the matter of determination of age would result in travesty of justice, which according to us, has happened in this case.* **(para 23)**

Petition dismissed. (E-8)

List of Cases cited:

1. Home Secretary (Prison) Vs H. Nilofer Nisha 1 and Amit Singh Vs St. of Mah., (2020) 14 SCC 161

2. Amit Singh Vs St. of Mah., AIR ONLINE 2011 SC 556

3. Pun. & Har. High Court in Gurdarshan Singh Vs St. of Pun. & anr., (2013) 2 AICLR 368

4. Satya Deo @ Bhoorey Vs St. of U.P., AIR 2020 Supreme Court 4826

5. Arnit Das Vs St. of Bihar, AIR 2000 Supreme Court 2264

6. Hari Ram Vs St. of Raj. & anr., AIR 2011 SC (Criminal) 2053

7. Kanu Sanyal Vs District Magistrate, Darjeeling & ors., (1973) 2 SCC 674

8.Home Secretary (Prison) Vs H. Nilofer Nisha, 2012 (9) SCC 768

9. Ashwani Kumar Saxena vs St. of M.P., 2012 (9) SCC 750

10. Abuzar Hossain @ Gulam Hossain Vs St. of W.B., 2012 (10) SCC 489

11. Om Prakash Vs St. of Raj. & anr., 2012 (5) SCC 201

12. Parag Bhati Vs St. of U.P. , 2016 (12) SCC 744

13. Mukarrab Vs St. of U.P., 2017 (2) SCC 210

14. Ramdeo Chauhan Vs St. of Assam, 2001 (5) SCC 714

15. Ram Vijay Singh Vs St. of U.P., 2021 ONLINE SC 142

16. St. of M. P. Vs Anoop Singh, 2015 (7) SCC 773

17. Babloo Pasi Vs St. of Jharkhand, (2008) 13 SCC 133

(Delivered by Hon'ble Mrs. Sunita Agarwal, J. & Hon'ble Pradeep Kumar Srivastava, J.)

1. Heard Sri Santosh Yadav learned counsel for the petitioner and Sri D.P.S Chauhan learned Additional Advocate General for the State respondents.

2. The instant petition has been filed for issuance of a writ in the nature of habeas corpus for release of the petitioner namely Kiranpal @ Kinna from the District Jail Agra, on the plea that his detention in jail is contrary to the fundamental rights guaranteed under Article 21 of the Constitution of India.

3. It is contended that vide order dated 19.9.2018, the Juvenile Justice Board, Bulandshahr had declared the petitioner juvenile as he was found to be 17 years, 9 months and 25 days on the date of the incident.

The brief facts of the case relevant to appreciate the plea of the petitioner are that a first information report dated 26.3.2000 was lodged against the petitioner and 13 others co-accused persons under Sections 147, 148, 302/149, 307/149, 323/149 IPC and 7th Criminal Law Amendment Act, registered as Case Crime No. 33 of 2000 at the Police Station Khanpur, District Bulandshahr. The time and date of the occurrence of the incident as per the said report was 9.30 AM on 26.3.2000.

It is contended that the petitioner was a minor at the time of the incident. Since the father of the petitioner was also one of the accused in the said criminal case, there was no one to pursue the matter except the illiterate mother of the petitioner. As a result of it, defence of juvenility of the petitioner could not be taken at the relevant point of time.

The investigating officer had submitted charge sheet and trial was commenced but neither the investigating agency nor the trial court made any effort on its own to find out the age of the petitioner at any point of time, during the course of the investigation or trial of the petitioner. The petitioner along with co-accused was convicted and sentenced vide judgment and order dated 29.9.2003 passed in the Sessions Trial No. 884 of 2000 for life imprisonment for the charges under section 302 read with Section 149 IPC; for seven years rigorous imprisonment for the charges under Section 307 read with Section 149 IPC; and six months rigorous imprisonment for the charges under Section 323 read with Section 149 IPC. All the sentences were to run concurrently. Aggrieved, the petitioner along with other co-accused filed Criminal Appeal No. 5009 of 2003, which was also dismissed vide judgment and order dated 27.3.2013 passed by this Court.

It is stated that on an application dated 21.3.2018 filed by the mother of the petitioner before the Juvenile Justice Board, Bulandshahr that the petitioner was minor at the time of the incident and he was entitled for the benefits of the Juvenile Justice (Care and Protection of Children) Act, 2000 (hereinafter referred to as "the Act, 2000") as amended from time to time, the Juvenile Justice Board, Bulandshahr vide order dated 19.9.2018 had declared the petitioner being 17 years, 9 months and 25 days of age on the date of the incident. It is

then contended that the order of the Juvenile Justice Board, Bulandshahr had never been challenged and hence has attained finality.

4. With the above facts, it is vehemently contended by Sri Santosh Yadav learned counsel for the petitioner that with the declaration of juvenility of the petitioner, he cannot be retained in jail and this Court has to issue a writ of habeas corpus for release of the petitioner declaring his detention in the District Jail, Agra as illegal. It is contended that even if, the petitioner had been found to be guilty of the offence under Section 302 read with Section 149 IPC, his detention had exceeded the maximum period provided in Section 15 of the Juvenile Justice Act, 2000 and as such, the detention of the petitioner in jail amounts to violation of Article 21 of the Constitution of India.

The submission is that the Juvenile Justice Act, 2000 is a benevolent legislation and based on the decision of the Apex Court in such matters, the benefit of juvenility is to be accorded to the petitioner. It is contended that with the dismissal of the criminal appeal by this Court against the order of conviction, no other forum is available to the petitioner to ventilate his grievances except seeking relief in this extraordinary writ jurisdiction of habeas corpus under Article 226 of the Constitution.

5. Reliance is placed upon the decisions of the Apex Court in **Home Secretary (Prison) vs. H. Nilofer Nisha1 and Amit Singh vs. State of Maharashtra**2 as also the decision of the Punjab and Haryana High Court in **Gurdarshan Singh vs. State of Punjab and another**3 to assert that the writ of habeas corpus is to be issued to quash the sentence awarded to the petitioner and direct for his release from the District Jail, Agra forthwith.

Placing reliance on the decisions of the Apex Court in **Satya Deo alias Bhoorey vs. State of Uttar Pradesh4; Arnit Das vs. State of Bihar**5 and **Hari Ram vs. State of Rajasthan and another**6 , it is contended that the benefit of Juvenile Justice Act, 2000 is to be accorded to the petitioner, as the crucial date for determination of juvenility of a person is the date of alleged commission of offence, that means if on the date of commission of alleged occurrence a person is found to be juvenile, he cannot be denied benefit of 2000, Act as the provisions of the said Act would apply by virtue of Section 7-A (inserted by Amendment Act, 33 of 2006), which provides that a claim of juvenility can be raised before any Court, at any stage, and even after the final disposal of the case.

6. It is vehemently argued by the learned counsel for the petitioner that in the case of **Hari Ram**6 , the Apex Court has dealt with the amendments brought by Act No. 33 of 2006 and held that with the introduction of Section 7-A in the 2000 Act, retrospective effect has been given to the provision of Juvenile Justice Act, 2000 and as such, the claim of juvenility of the petitioner could be raised, before any Court, at any stage, as has been done in the instant case. The Juvenile Justice Board, Bulandshahr had entertained the application moved by the mother of the petitioner keeping in mind the above decisions of the Apex Court and upon enquiry found the petitioner being juvenile on the date of the incident.

It is vehemently argued that in view of the aforesaid position of law and the facts of the case, the petitioner is entitled to be

released from the jail by issuance of a writ of habeas corpus.

7. Learned Additional Advocate General appearing for the State respondents, on the other hand, raised the issue of maintainability of the present petition. It is contended that a writ of habeas corpus can only be issued when the detention or confinement of a person is without the authority of law. The detention of the petitioner in the District Jail, Agra is pursuant to the decision of the Court of law. The petitioner had been held to be an accused, guilty of commission of heinous offences under Section 302 read with Section 149 IPC on appreciation of evidence by two courts of law, the trial Court as well as the appellate Court. Only remedy available before the petitioner was to challenge the decision of the appellate Court, upholding the judgment of conviction and sentence passed by the trial court, in appeal before the Supreme Court. In a proper proceeding before the Apex Court, the petitioner could have filed an application seeking determination of his claim of juvenility. In such a proceeding, the Apex Court may have examined his claim on its own or would have directed the Juvenile Justice Board to determine the same. In any eventuality, the writ of habeas corpus cannot be issued for release of a prisoner, after conviction by a Court of law.

8. In the light of the above contentions of the learned counsels for the parties and the factual back ground of the case, three questions arise for determination by this Court; (i) Whether the writ of Habeas Corpus is an appropriate remedy and this Court can release the petitioner treating his detention or confinement in jail without the authority of law?; (ii) whether the Juvenile Justice Board, Bulandshahr had adopted the prescribed procedure while declaring the petitioner juvenile by the order dated 19.9.2018 ?; (iii) whether the petitioner is entitled to the benefits of the Juvenile Justice Act in view of the said order?

The above three questions are interlinked to each other and cannot be answered individually. The legal position in regard to each question has to be examined and, thereafter, answer can be given only on appreciation of the facts of the instant case. According to us, it is necessary to be examined as to whether the order passed by the Juvenile Justice Board determining the claim of juvenility on the material before it, is justifiable so as to invoke the extraordinary power to issue a writ of habeas corpus for release of the petitioner.

9. Dealing with the question no. (i) regarding the maintainability of the habeas corpus petition, we would refer to the decision of the Apex Court relied by the learned counsel for the petitioner in the case of **Home Secretary (Prison)**1. The legal position with regard to the scope and ambit of the jurisdiction of the High Court while dealing with the writ of habeas corpus has been summarised by the Apex Court therein in the following words:-

*"***13**. *Article 226 of the Constitution of India empowers the High Courts to issue certain writs including writs in the nature of habeas corpus, mandamus, prohibition, quo Warranto and certiorari for the enforcement of any right conferred under Part III of the Constitution dealing with the fundamental rights. In this case, we are concerned with the scope and ambit of the jurisdiction of the High Court while dealing with the writ of habeas corpus.*

14. *It is a settled principle of law that a writ of habeas corpus is available as a remedy in all cases where a person is deprived of his/her personal liberty. It is processual writ to secure liberty of the citizen from unlawful or unjustified detention whether a person is detained by the State or is in private detention. As Justice Hidayatullah (as he then was) held; "The writ of habeas corpus issues not only for release from detention by the State but also for release from private detention" [Mohd. Ikram v. State of U.P., AIR 1964 SC 1625]. At the same time, the law is well established that a writ of habeas corpus will not lie and such a prayer should be rejected by the Court where detention or imprisonment of the person whose release is sought is in accordance with the decision rendered by a court of law or by an authority in accordance with law.*

15. *According to Dicey, "if, in short, any man, woman, or child is, or is asserted on apparently good grounds to be, deprived of liberty, the Court will always issue a writ of habeas corpus to anyone who has the aggrieved person in his custody to have such person brought before the Court, and if he is suffering restraint without lawful cause, set him free."[A.V. Dicey, Introduction to the Study of the Law of the Constitution, Macmillan And Co., Limited, p. 215 (1915) 3 Halsbury's Laws of England, (4th Edn.) Vol. 11, para 1454 p. 769]*

16. *In Halsburry's Laws of England, a writ of habeas corpus is described as "a remedy available to the lowliest subject against the most powerful."[V.G. Ramachandran's Law of Writs, revised by Justice C.K. Thakker & M.C. Thakker, Eastern Book Company, , p.1036, 6th Edn. (2006)] . It is a writ of such a sovereign and transcendent authority that no privilege of person or place can stand against it.*

17. *A writ of habeas corpus can only be issued when the detention or confinement of a person is without the authority of law. Though the literal meaning of the Latin phrase habeas corpus is "to produce the body', over a period of time production of the body is more often than not insisted upon but legally it is to be decided whether the body is under illegal detention or not. Habeas corpus is often used as a remedy in cases of preventive detention because in such cases the validity of the order detaining the detenu is not subject to challenge in any other court and it is only writ jurisdiction which is available to the aggrieved party. The scope of the petition of habeas corpus has over a period of time been expanded and this writ is commonly used when a spouse claims that his/her spouse has been illegally detained by the parents. This writ is many times used even in cases of custody of children. Even though, the scope may have expanded,* ***there are certain limitations to this writ and the most basic of such limitation is that the Court, before issuing any writ of habeas corpus must come to the conclusion that the detenue is under detention without any authority of law."*** *(Emphasis supplied)*

The question before the Apex Court therein was as to whether a writ of habeas corpus would lie, for securing release of a person who is undergoing a sentence of imprisonment imposed by a Court of competent jurisdiction praying that he be released in terms of some Government orders/rules providing for premature release of prisoners. The answer given by the Apex Court with the above observations was "No' as it was held that the grant of remission or parole is not a right vested with the prisoner. It is a privilege available to the prisoner on

fulfilling certain conditions. The earlier decision of the Apex Court in **Kanu Sanyal vs. District Magistrate, Darjeeling and others**7 had been referred in paragraph "21' of the said decision in the following words:-

"21. In Kanu Sanyal v. District Magistrate, Darjeeling reported in (1973) 2 SCC 674 this Court while dealing with the writ of habeas corpus has held as follows:

"4. It will be seen from this brief history of the writ of habeas corpus that it is essentially a procedural writ. It deals with the machinery of justice, not the substantive law. The object of the writ is to secure release of a person who is illegally restrained of his liberty...."

In paragraphs "23' and "24' of the said decision (**Home Secretary (Prison) vs. H. Nilofer Nisha**), it was said that:-

"23. In Saurabh Kumar v. Jailor, Koneila Jail [(2014) 13 SCC 436], this Court came to the conclusion that the petitioner was in judicial custody by virtue of an order passed by the judicial magistrate and, hence, could not be said to be in illegal detention. Justice T.S. Thakur, as he then was, in his concurring judgment held as follows:

"22. The only question with which we are concerned within the above backdrop is whether the petitioner can be said to be in the unlawful custody. Our answer to that question is in the negative. The record which we have carefully perused shows that the petitioner is an accused facing prosecution for the offences, cognizance whereof has already been taken by the competent court. He is presently in custody pursuant to the order of remand made by the said Court. A writ of habeas corpus is, in the circumstances, totally misplaced..."

24. The same view has been taken in the State of Maharashtra and Others v. Tasneem Rizwan Siddiquee [(2018) 9 SCC 745] wherein it was observed that no writ of habeas corpus could be issued when the detenue was in detention pursuant to an order passed by the Court. As far as the present cases are concerned, it is not disputed that the detenues are behind bars pursuant to conviction and sentence imposed upon them by a court of competent jurisdiction and confirmed by this Court, whereby they were sentenced to undergo imprisonment for life."

It was, thus, held by the Apex Court that a writ of habeas corpus is maintainable by a person who is in detention,even a prisoner in judicial custody by virtue of a judicial order, if his fundamental rights are violated.

10. Invoking the said principle, the petitioner herein is seeking release from the jail on the ground that his fundamental right to life and liberty is being restrained as after declaration of his juvenility his detention is illegal. The right to freedom claimed by the petitioner,thus,is dependent on the determination of his age/ claim of juvenility and not otherwise. The issue,thus, can be answered with reference to the legal provisions pertaining to the Juvenile Justice Act, 2000 amended from time to time. The Juvenile Justice Act, 2000 provided the age of "juvenile" under Section 2(k) means a person, who has not completed eighteenth (18) year of age. The "juvenile in conflict with law" under Section 2(l) means a juvenile who is alleged to have committed an offence and has not completed eighteenth (18) year of age on the date of commission of such offence. Section 7-A inserted in the

Juvenile Justice Act, 2000 by Amendment Act No. 33 of 2006 reads as under:-

*"[**7-A. Procedure to be followed when claim of juvenility is raised before any court.**- (1) Whenever a claim of juvenility is raised before any court or a court is of the opinion that an accused person was a juvenile on the date of commission of the offence, the court shall make an 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.]"

The sub section(1) thus, provides that a claim of juvenility can be raised before any court and whenever such a claim is raised, the Court shall make an enquiry, 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.

The proviso to Section 7-A ,however, states that a claim of juvenility may be raised before any court at any stage, even after final disposal of the case, and such claim shall be determined in terms of the provisions contained in the 2000 Act and the Rules made thereunder, even if the juvenile has ceased to be so on or before the date of commencement of the Act. Thereby, retrospective effect has been given to the Juvenile Justice Act'2000 ,which came into force w.e.f 1.4.2001, by the Amendment Act' 2006.

Sub-section (2) of Section 7-A of the Act, 2000 further says that if upon an enquiry {which has to be made under sub-section (1)}, this Court finds a person to be juvenile on the date of commission of the offence, 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.

In the instant case, the date of commission of the offence was 26.3.2000 ; there is, thus, no quarrel about the applicability of the Juvenile Justice Act, 2000. The legal position is also well settled that the application raising a claim of juvenility cannot be rejected on the ground of being filed at the belated stage.

11. We may further note that in **Anil Agarwala & another VS. State of West Bengal**8 , the order passed by the High Court in rejection of the application of the appellant therein on the ground of being filed at the belated stage came up for consideration before the Apex Court. It was held therein:-

"6. Having regard to the above provisions, we set aside the order passed by the High Court which is incompatible with the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 and direct the trial court to first of all look into the question of juvenility, as

claimed by the appellants herein and after disposal of the claim made by the appellants that they were minors on the date of the alleged incident, it shall proceed with the trial. In the event the trial court comes to a finding that the appellants were minors at the time of commission of the offence, it shall immediately send them to the Juvenile Justice Board concerned for considering their cases in accordance with the provisions of the 2000 Act. It is expected that these applications which have been filed on behalf of the appellants will be disposed of within three months from the date of receipt a copy of this order."

In **Ashwani Kumar Saxena vs State Of M.P**.9, while examining the scope of Section 7-A of the Act, it was held by the Apex Court that the said statutory provisions obliges the Court to make an inquiry under the Juvenile Justice Act regarding age of the accused/appellant on the date of the incident.

From a careful reading of the provisions of Section 7-A of the Juvenile Justice Act, 2000, it is,thus, clear that a claim of juvenility when raised, an enquiry is to be made by the Court before which the claim is made and if the Court upon such an enquiry finds a person to be juvenile on the date of alleged commission of the offence, benefit of Juvenile Justice Act shall be given to him. The Court making such an enquiry shall be required to take necessary evidence to determine the age of such person.

The enquiry into the claim of the petitioner herein has already been made by the Juvenile Justice Board and his age has been determined on the basis of the report of the medical board. The right of the petitioner to seek release from the prison,thus,would depend upon the result of the said enquiry which has to be necessarily based on the evidence brought on record, having been completed by adopting due procedure of law.

12. Necessary question, therefore, arise for our consideration is as to whether the Juvenile Justice Board, Bulandshahr had followed the procedure prescribed under the Juvenile Justice Act for determination of age of the petitioner on the date of commission of the crime and the order declaring juvenility of the petitioner is legally sustainable.

The answer to these questions would require consideration of the legal provision in the matter of determination of age of a person under the Juvenile Justice Act.

The Juvenile Justice Act, 2000 does not lay down any fixed criteria for determining the age of a person. Section 49(1) of the Act, 2000 provides for presumption and determination of age in the following words:-

*"**49. Presumption and determination of age**.- (1) Where it appears to a competent authority that person brought before it under any of the provisions of this Act (otherwise than for the purpose of giving evidence) is a juvenile or the child, the competent authority shall make due inquiry so as to the age of that person and for that purpose shall take such evidence as may be necessary (but not an affidavit) and shall record a finding whether the person is a juvenile or the child or not, stating his age as nearly as may be."*

13. From a reading of the said provision, it is clear that it provides that when a person is brought before the Court

(Juvenile Justice Board), it is obliged to ascertain the age of that person and for the purpose of enquiry, the board shall take such evidence as may be necessary and then record a finding whether the person is a juvenile or child or not, stating his age as nearly as may be. Under Rule 12 of Rules, 2007 framed under Juvenile Justice Act, 2000, the Board is enjoined to take evidence for determination of age.

Rule 12 reads as under:-

*"**12. Procedure to be followed in determination of Age**.— (1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be the Committee referred to in rule 19 of these rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.*

(2) The court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining -

(a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year. and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in sub-rule (3), the court or the Board or as the case may be the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these rules and a copy of the order shall be given to such juvenile or the person concerned.

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of section 7A, section 64 of the Act and these rules, no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule (3) of this rule.

(6) The provisions contained in this rule shall also apply to those disposed off cases, where the status of juvenility has not been determined in accordance with the provisions contained in subrule (3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law.."

14. In **Abuzar Hossain alias Gulam Hossain vs. State of West Bengal**10 , the provisions of Juvenile Justice Act, 2000 and the Rules, 2007 framed thereunder came for consideration. The three Judges Bench of the Apex Court has observed that the credibility and acceptability of the documents including the certificate of education of the person with regard to whom enquiry is made would depend on the facts and circumstances of each case and no hard and fast rule as such can be prescribed.

It was observed as under:-

*"**39.3.** As to what materials would prima facie satisfy the court and/or are sufficient for discharging the initial burden cannot be catalogued nor can it be laid down as to what weight should be given to a specific piece of evidence which may be sufficient to raise presumption of juvenility but the documents referred to in Rule 12(3)(a)(i) to (iii) shall definitely be sufficient for prima facie satisfaction of the court about the age of the delinquent necessitating further enquiry under Rule 12. The statement recorded under Section 313 of the Code is too tentative and may not by itself be sufficient ordinarily to justify or reject the claim of juvenility. The credibility and/or acceptability of the documents like the school leaving certificate or the voters' list, etc. obtained after conviction would depend on the facts and circumstances of each case and no hard and fast rule can be prescribed that they must be prima facie accepted or rejected. In Akbar Sheikh vs. State of W.B. [(2009) 7 SCC 415] and Pawan vs. State of Uttaranchal [(2009) 15 SCC 259] these documents were not found prima facie credible while in Jitendra Singh vs. State of U.P. [(2010) 13 SCC 523] the documents viz., school leaving certificate, marksheet and the medical report were treated sufficient for directing an inquiry and verification of the appellant's age. If such documents prima facie inspire confidence of the court, the court may act upon such documents for the purposes of Section 7A and order an enquiry for determination of the age of the delinquent.*

***39.5**. The court where the plea of juvenility is raised for the first time should always be guided by the objectives of the 2000 Act and be alive to the position that the beneficent and salutary provisions contained in 2000 Act are not defeated by hyper-technical approach and the persons who are entitled to get benefits of 2000 Act get such benefits. The courts should not be unnecessarily influenced by any general impression that in schools the parents/guardians understate the age of their wards by one or two years for future benefits or that age determination by medical examination is not very precise. The matter should be considered prima facie on the touchstone of preponderance of probability.*

***39.6** Claim of juvenility lacking in credibility or frivolous claim of juvenility or patently absurd or inherently improbable claim of juvenility must be rejected by the court at threshold whenever raised."*

In his concurring judgment, Hon'ble Justice T.S. Thakur (as the Chief Justice then was) speaking for the Bench added a note of caution in the matter of enquiry under the Act, it was observed that the

words "physical appearance" of the accused used in Rule 12(2) of the Rules, 2007 loose its efficacy where the claim is made before the Higher Court for the first time. The advantage of "physical appearance" of the accused is reduced because of considerable lapse of time between the incident and hearing of the matter by the Court. It was observed that there may be cases where the accused may not be in a position to provide a birth certificate from the competent authority as they may not have maintained it. It was held that the approach at the stage of directing the enquiry as of necessity has to be more liberal, lest, there is avoidable miscarriage of justice. But directing an enquiry is not the same thing as declaring the accused to be a juvenile. **The standard of proof required is different for both the stages. In the former, the Court simply records a prima facie conclusion. In the latter, the Court makes a declaration on evidence that it scrutinises and accepts only if it is worthy of such acceptance.**

In **Om Prakash vs. State of Rajasthan and another**11, the Apex Court while considering the question whether medical evidence and other attending circumstances would be of any value and assistance while determining the age of a juvenile, if the academic record certificates do not conclusively prove the age of the accused, has held that the claim of juvenility taking benefit of the benevolent legislation can be made applicable in favour of only those delinquents who undoubtedly have been held to be juvenile which leaves no scope for speculation about the age of the alleged accused. It was held that if there is a clear and unambiguous case in favour of the juvenile accused, he would be entitled for the special protection under the Juvenile Justice Act. But it was observed that when an accused commits a grave and heinous offence and, thereafter, attempts to take statutory shelter under the guise of being a minor, a casual or cavalier approach while recording as to whether an accused is a juvenile or not cannot be permitted.

In paragraphs '22' and '23', the Apex Court observed as under:-...

"22. xxxxxxxxxxxxxxx But when an accused commits a grave and heinous offence and thereafter attempts to take statutory shelter under the guise of being a minor, a casual or cavalier approach while recording as to whether an accused is a juvenile or not cannot be permitted as the courts are enjoined upon to perform their duties with the object of protecting the confidence of common man in the institution entrusted with the administration of justice.

23. Hence, while the courts must be sensitive in dealing with the juvenile who is involved in cases of serious nature like sexual molestation, rape, gang rape, murder and host of other offences, the accused cannot be allowed to abuse the statutory protection by attempting to prove himself as a minor when the documentary evidence to prove his minority gives rise to a reasonable doubt about his assertion of minority. Under such circumstance, the medical evidence based on scientific investigation will have to be given due weight and precedence over the evidence based on school administration records which give rise to hypothesis and speculation about the age of the accused. Xxxxxxxxxxxxxxx."

It was said that the principle of benevolent legislation would apply only to such cases wherein the accused is held to be a juvenile on the basis of at least prima facie evidence regarding his minority.

In **Parag Bhati vs. State of U.P**.12, after referring **Abuzar Hossain**10, **Om Prakash**11 and other decisions of the Apex Court,It was held that the Courts are enjoined upon to perform their duties with the object to protect the confidence of common man in the institution entrusted with the administration of justice. A casual or cavalier approach while recording as to whether the accused is a juvenile or not cannot be permitted.

It was held that the claim of juvenility cannot be allowed to be raised merely to create a mist or a smokescreen to seek shelter by using it as a protective umbrella or Statutory shield. The provisions of a benevolent legislation (Juvenile Justice Act) cannot be used to subvert or dupe the cause of justice

In **Mukarrab v. State of Uttar Pradesh**13, the question fell for consideration was whether the opinion of the Medical Board of AIIMS determining the age of the appellants therein can be accepted or not. Considering the report of the Medical Board, having regard to the facts and circumstances of the case, it was observed therein that:-

26. *xxxxxxxxxx a blind and mechanical view regarding the age of a person cannot be adopted solely on the basis of the medical opinion by the radiological examination. At page 31 of Modi's Text Book of Medical Jurisprudence and Toxicology, 20th Edn., it has been stated as follows:*

"In ascertaining the age of young persons radiograms of any of the main joints of the upper or the lower extremity of both sides of the body should be taken, an opinion should be given according to the following table, but it must be remembered that too much reliance should not be placed on this table as it merely indicates an average and is likely to vary in individual cases even of the same province owing to the eccentricities of development." Courts have taken judicial notice of this fact and have always held that the evidence afforded by radiological examination is no doubt a useful guiding factor for determining the age of a person but the evidence is not of a conclusive and incontrovertible nature and it is subject to a margin of error. Medical evidence as to the age of a person though a very useful guiding factor is not conclusive and has to be considered along with other circumstances.

27. *In a recent judgment, State of Madhya Pradesh v. Anoop Singh (2015) 7 SCC 773, it was held that the ossification test is not the sole criteria for age determination. Following Babloo Pasi and Anoop Singh's cases, we hold that ossification test cannot be regarded as conclusive when it comes to ascertaining the age of a person. More so, the appellants herein have certainly crossed the age of thirty years which is an important factor to be taken into account as age cannot be determined with precision. In fact in the medical report of the appellants, it is stated that there was no indication for dental x-rays since both the accused were beyond 25 years of age.*

28. *At this juncture, we may usefully refer to an article "A study of wrist ossification for age estimation in pediatric group in central Rajasthan", which reads as under:-*

"There are various criteria for age determination of an individual, of which eruption of teeth and ossification activities of bones are important. Nevertheless age can usually be assessed more accurately in younger age group by dentition and ossification alongwith epiphyseal fusion.

[Ref: Gray H. Gray's Anatomy. 37th ed. Churchill Livingstone Edinburgh London Melbourne and New York: 1996; 341-342];

A careful examination of teeth and ossification at wrist joint provide valuable data for age estimation in children.

[Ref: Parikh CK. Parikh's Textbook of Medical Jurisprudence and Toxicology. 5th edn.: Mumbai Medico-Legal Centre Colaba:1990;44-45];

Variations in the appearance of centre of ossification at wrist joint shows influence of race, climate, diet and regional factors. Ossification centres for the distal ends of radius and ulna consistent with present study vide article "A study of Wrist Ossification for age estimation in pediatric group in Central Rajasthan" by Dr. Ashutosh Srivastav, Senior Demonstrator and a team of other doctors, Journal of Indian Academy of Forensic Medicine (JIAFM), 2004; 26(4). ISSN 0971-0973].

29. In the present case, their physical, dental and radiological examinations were carried out. Radiological examination of Skull (AP and lateral view), Sternum (AP and lateral view) and Sacrum (lateral view) was advised and performed. As per the medical report, there was no indication for dental x-rays since both the accused were much beyond 25 years of age. Therefore, the age determination based on ossification test though may be useful is not conclusive. An X-ray ossification test can by no means be so infallible and accurate a test as to indicate the correct number of years and days of a person's life."

The Court observed that age determination using ossification test does not yield accurate and precise conclusions after the examinee crosses the age of 30 years which is an important factor to be taken into account.

The Apex Court in **Ramdeo Chauhan vs. State of Assam**14 has said that the Courts are enjoined upon to perform their duties with the object of strengthening the confidence of the common man in the institution entrusted with the administration of justice. Any effort which weakens the system and shakes the faith of common man in the justice dispensation system has to be discouraged.

The Juvenile Justice Act, 2000 has been repealed with the enactment of the Juvenile Justice (Care and Protection of Children) Act, 2015 (hereinafter referred to as "the Act, 2015"), which has been brought into force on 15.1.2016.

15. Section 94 of the Act, 2015 provides the criteria of presumption and determination of age by the Committee or the Board on the appearance of a person before it and make an enquiry to determine the age of that person.

Section 94 reads as under:-

"94. Presumption and determination of age- *(1) Where, it is obvious to the Committee or the Board, based on the appearance of the person brought before it under any of the provisions of this Act (other than for the purpose of giving evidence) that the said person is a child, the Committee or the Board shall record such observation stating the age of the child as nearly as may be and proceed with the inquiry under section 14 or section 36, as the case may be, without waiting for further confirmation of the age.*

(2) In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall

undertake the process of age determination, by seeking evidence by obtaining--

(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;

(ii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board:

Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order.

(3) The age recorded by the Committee or the Board to be the age of person so brought before it shall, for the purpose of this Act, be deemed to be the true age of that person."

A comparison of Section 94 of Act, 2015 and the Rule 12(3) of the Rules, 2007 shows that the procedure prescribed in Section 94 of the Act, 2015 is not materially different from the provision in Rule 12 of the Rules, 2007 to determine the age of the person. There are though some minor variation as the Rule 12(3)(a)(i) and (ii) have been clubbed together.

Section 94, thus, treats both the birth certificate from the school certificate or the matriculation or equivalent certificate from the concerned examination board at the same ***level/pedestal***. However, the importance of ossification test as a means of the determination of age has not undergone change with the enactment of Section 94 of the Act.

16. It was observed in **Ram Vijay Singh v. State of U.P.**15, a recent decision of the Apex Court that the reliability of the ossification test remains vulnerable under Section 94 of the Act, 2015 as was under Rule 12 of the Rules. The Court observed that as per the scheme of the Act, it is only in case of doubt, the process of age determination by seeking evidence becomes necessary. At that stage, when a person is around 18 years of age, the ossification test can be said to be relevant for determining the approximate age of a person in conflict with law. However, when the person is around 40-45 years of age, the structure of bones cannot be helpful in determining the age.

It was observed in paragraph '16' as under:-

"16. xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx This Court in Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal and Ors. 7 held, in the context of certificate required under Section 65B of the Evidence Act, 1872, that as per the Latin maxim, lex non cogit ad impossibilia, law does not demand the impossible. Thus, when the ossification test cannot yield trustworthy and reliable results, such test cannot be made a basis to determine the age of the person concerned on the date of incident. Therefore, in the absence of any reliable trustworthy medical evidence to find out age of the appellant, the ossification test conducted in year 2020 when the appellant was 55 years of age cannot be conclusive to declare him as a juvenile on the date of the incident."

Taking note of its earlier decisions in **Mukarrab**13, **State of Madhya Pradesh vs. Anoop Singh**16 & **Babloo Pasi vs**

State of Jharkhand17, it was held in paras '15' & '16' as under:-

*"**15**. We find that the procedure prescribed in Rule 12 is not materially different than the provisions of Section 94 of the Act to determine the age of the person. There are minor variations as the Rule 12(3)(a)(i) and (ii) have been clubbed together with slight change in the language. Section 94 of the Act does not contain the provisions regarding benefit of margin of age to be given to the child or juvenile as was provided in Rule 12(3)(b) of the Rules. The importance of ossification test has not undergone change with the enactment of Section 94 of the Act. The reliability of the ossification test remains vulnerable as was under Rule 12 of the Rules.*

***16**. As per the Scheme of the Act, when it is obvious to the Committee or the Board, based on the appearance of the person, that the said person is a child, the Board or Committee shall record observations stating the age of the Child as nearly as may be without waiting for further confirmation of the age. Therefore, the first attempt to determine the age is by assessing the physical appearance of the person when brought before the Board or the Committee. It is only in case of doubt, the process of age determination by seeking evidence becomes necessary. At that stage, when a person is around 18 years of age, the ossification test can be said to be relevant for determining the approximate age of a person in conflict with law. However, when the person is around 40-55 years of age, the structure of bones cannot be helpful in determining the age. xxxxxxxxxxxxxxxxxx."*

17. From the above discussion, it is evident that the statutory provisions in the matter of determination of age of the person brought before the Board, lays down the manner of enquiry which has to be done strictly in accordance with the provisions mentioned therein by the Court before whom the matter is brought. The credibility or accountability of the documents would depend on the fact and circumstances of each case and no strait-jacket formula can be prescribed as to how and when the Court can record its prima facie satisfaction or reject the claim of juvenility at the stage of initiation of inquiry. However, once enquiry is initiated, the evidence brought before the Court have to be appreciated to ascertain the age of the person who claims to be a juvenile. The claim of juvenility lacking in credibility or frivolous claim of juvenility or patently absurd or inherently improper claim of juvenility must be rejected. (emphasis added)

At this juncture, we would be benefited by the following observations of the Apex Court in **Om Prakash**11 and **Parag Bhati**12 as under:-

"(Om Prakash)11 para 37.....Juvenile Justice Act which undoubtedly is a benevolent legislation but cannot be allowed to be availed of by an accused who has taken the plea of juvenility merely as an effort to hide his real age so as to create a doubt in the mind of the courts below who thought it appropriate to grant him the benefit of a juvenile merely by adopting the principle of benevolent legislation but missing its vital implication that although the Juvenile Justice Act by itself is a piece of benevolent legislation, the protection under the same cannot be made available to an accused who in fact is not a juvenile but seeks shelter merely by using it as a protective umbrella or statutory shield. We

are under constraint to observe that this will have to be discouraged if the evidence and other materials on record fail to prove that the accused was a juvenile at the time of commission of the offence."

"(**Parag Bhati)**12 para 35. The benefit of the principle of benevolent legislation attached to the JJ Act would thus apply to only such cases wherein the accused is held to be a juvenile on the basis of at least prima facie evidene regarding his minority as the benefit of the possibilities of two vies in regard to the age of the alleged accused who is involved in grave and serious offence which he committed and gave effect to it in a well-planned manner reflecting his maturity of mind rather than innocence indicating that his plea of juvenility is more in the nature of a shield to dodge or dube the arms of law, cannot be allowed to come to his rescue."

In **Om Prakash**11 , the Apex Court had drawn a parallel between the plea of minor or plea of alibi to observe as under:-

"32. Drawing parallel between the plea of minority and the plea of alibi, it may be worthwhile to state that it is not uncommon to come across criminal cases wherein an accused makes an effort to take shelter under the plea of alibi which has to be raised at the first instance but has to be subjected to strict proof of evidence by the court trying the offence and cannot be allowed lightly in spite of lack of evidence merely with the aid of salutary principle that an innocent man may not have to suffer injustice by recording an order of conviction in spite of his plea of alibi.

33. Similarly, if the conduct of an accused or the method and manner of commission of the offence indicates an evil and a well planned design of the accused committing the offence which indicates more towards the matured skill of an accused than that of an innocent child, then in the absence of reliable documentary evidence in support of the age of the accused, medical evidence indicating that the accused was a major cannot be allowed to be ignored taking shelter of the principle of benevolent legislation like the Juvenile Justice Act, subverting the course of justice as statutory protection of the Juvenile Justice Act is meant for minors who are innocent law breakers and not accused of matured mind who uses the plea of minority as a ploy or shield to protect himself from the sentence of the offence committed by him."

In the same context, while considering the relevance and value of medical evidence in the inquiry by the Juvenile Justice Board in **Ramdeo Chauhan**14 , the Apex Court has observed that:-

"21. ..... The statement of the doctor is no more than an opinion. the court has to base its conclusions upon all the facts and circumstances disclosed on examining of the physical features of the person whose age is in question, in conjunction with such oral testimony as may be available. An X-ray ossification test may provide a surer basis for determining the age of an individual than the opinion of a medical expert but it can by no means be so infallible and accurate a test as to indicate the exact date of birth of the person concerned. Too much of reliance cannot be placed upon text books, on medical jurisprudence and texicology while determining the age of an accused. In this vast country with varied latitude, heights, environment, vegetation and nutrition, the height and weight cannot be expected to be uniform." (emphasis supplied)

"22. .....there is not an iota of doubt in my mind to hold that the petitioner was not a child or near or about the age of being a child within the meaning of the Juvenile Justice Act or the Children Act. He is proved to be a major at the time of the commission of the offence. No doubt, much less a reasonable doubt is created in the mind of the Court, for the accused entitling him the benefit of a lesser punishment. It is true that the accused tried to create a smoke screen with respect to his age but such efforts appear to have been made only to hide his real age and not to create any doubt in our mind. The judicial system cannot be allowed to be taken to ransom by having resort to imaginative and concocted grounds by taking advantage of loose sentences appearing in the evidence of some of the witnesses, particularly at the stage of special leave petition. The law insists for finality of judgments and is more concerned with the strengthening of the judicial system. The courts are enjoined upon to perform their duties with the object of strengthening the confidence of the common man in the institution entrusted with the administration of justice. Any effort which weakens the system and shakens the faith of the common man in the justice dispensation system has to be discouraged."

"23. After committing the crime of murder of four innocent persons, the petitioner cannot be permitted to resort to adopt means and tactics or to take measures which, if accepted or condoned, may result in the murder of the judicial system itself. The efforts made by the accused by way of this petition, are not likely to advance the interests of justice but on the contrary frustrate it."

18. From the above discussion, it is evident that as far as the medical evidence is concerned, the same has been considered as a last resort in the matter of determination of age. The ossification test at a belated stage after advancement of age of the accused/convict cannot be conclusive to determine him as a juvenile on the date of the incident, as the evidence afforded by radiological examination is no doubt a useful guiding factor for determining the age of the person but is not of a conclusive and incontrovertible nature and it is subject to a margin of error.

Thus, it is held in **Mukarrab**13; **Ramdeo Chauhan**14 & **Ram Vijay Singh**15 that the medical evidence as to the age of a person though a very useful guiding factor, is not conclusive and has to be considered in conjunction with other circumstances and oral testimony as may be available. It is fallible and in absence of reliable, trustworthy medical evidence to find the age of a person, the ossification test conducted at a belated stage cannot be conclusive to declare him a juvenile on the date of the incident.

19. In light of the above legal position in the matter of determination of age of a person who claims to be juvenile, the facts of the instant case are to be appreciated.

20. The supplementary affidavit dated 16.12.2019 filed in this habeas corpus petition states that a public interest litigation no. 855 of 2012 was filed before this Court wherein an order dated 24.5.2012 was passed to identify those prisoners who were juvenile at the time of commission of offence and direction was issued to take suo moto action and extend legal aid. Pursuant thereto, the petitioner moved an application before the Secretary, District Legal Services Authority, Agra through the Senior Superintendent, Central

Jail, Agra to provide him an advocate to do pairavi on his behalf. On the said application, a letter was forwarded to the Secretary, District Legal Services Authority and an advocate was provided to the petitioner. An application dated 3.5.2017 was then moved through Dhirendra Singh Kushwaha, Advocate Civil Court, Agra to state that the petitioner Kiran Pal @ Kinna is an illiterate person and as such he does not possess documentary evidence relating to his age. In that eventuality, age determination of the petitioner/applicant was required to be done through a Medical Board. The copy of the application dated 3.5.2017, appended as Annexure S.A. '2' to the supplementary affidavit moved before the Juvenile Justice Board, Agra, is not supported by any affidavit of the petitioner to depose the statement made therein. It seems that the Juvenile Justice Board, Agra on the presentation of the said application on 3.5.2017, ignoring the said fact, had directed for the medical examination of the petitioner/ applicant. The record further indicates that on 1.7.2017, on an objection raised by the prosecution regarding the jurisdiction of the Juvenile Justice Board, Agra, the application dated 3.5.2017 was returned for placing it before the appropriate Court.

After return of the application by the Juvenile Justice Board, Agra, it seems that the mother of the petitioner had filed an application dated 21.3.2018 before the Juvenile Justice Board, Bulandshahr stating therein that her son was a juvenile on the date of the incident which was registered as Case Crime No. 33 of 2000 and tried as S.T. No. 884 of 2000 under Section 304, 307 IPC. Later an affidavit dated 5.9.2018 was filed by the mother of the petitioner in Misc. Case No. 19 of 2018 which has been appended at "page 27' of the supplementary affidavit. The statement on oath therein are that her son was a juvenile and no appeal before the High Court or Supreme Court against S.T. No. 884 of 2000 in relation to Case Crime No. 33/2000 was pending. It may be noteworthy that in the said application, the mother of the petitioner did not disclose that the criminal appeal filed before this Court had already been dismissed in the year 2013. It further seems that the mother of the petitioner insisted for determination of age of the petitioner on the basis of the medical report given by the Chief Medical Officer,Agra. The medical report dated 31.5.2017 was submitted under the directions of the Juvenile Justice Board, Agra, which had no jurisdiction in the matter. This said report, however, was brought on record by the counsel for the applicant before the Board at Bulandshahr. The issuance of the said report was though verified from the office of the Chief Medical Officer,Agra and considering the observations in Mukarrab13, determination of age of the petitioner was made, giving a variation of two years in upper age limit i.e. treating the age of appellant as 36 years and then giving additional benefit of lowering his age by one year in terms of rule 12(3)(b) to 35 years as on the date of the medical examination, in May, 2017. That way the petitioner was held to be 17 years 9 months and 25 days on the date of occurrence on 26.3.2000.

21. A perusal of the medical report dated 31.5.2017 shows that the three member Board which was comprised of the Chief Medical Officer, Agra, Radiologist, District Hospital Agra and a Dentist, performed X-rays of "skull and sternum' as also made an assessment of physical characteristics of the petitioner so as to ascertain his physical and dental development. The general physical

examination findings are consistent with the physical characteristics of a normal adult male. Dental examination shows presence of complete 16 sets of permanent teeth. Moreover,the estimation of age from the teeth by physical and X-ray examination is not possible after 20 to 25 years of age. No X-ray of any other joint of lower extremity or sacrum was performed. As stated at "page 218' of Modi's textbook of Medical jurisprudence 25th edition, the age estimation should not be based entirely on X-ray of a single joint or bone. A number of factors including race, gender, nutritional status etc influence the age of appearance and fusion of epiphysis.

At page '216' of the said text book it is stated that:-

"In ascertaining the age of young persons, radiograms of several main joints of the upper or the lower extremity of one or both sides of the body should be taken, and an opinion should be given according to the following table. However, it must be remembered that too much reliance should not be placed on this table as it merely indicates an average and is likely to vary in individual cases even of the same province, owing to the eccentricities of development (see the following table)."

It would be useful to reproduce the X-ray report as under:

"X-ray sternum-All pieces of sternum body found. X.P. & M.S. not found.
X-ray Skull-Sagital Suture is obliterated. Coronal & others not obliterated."

The X-ray of sternum, however, seems incomplete in as much as reading of the report shows that "X.P &M.S (two upper & lower parts of sternum) not found' whereas all pieces of sternum body found. As far as the X-ray report of sternum is concerned ,the guidelines in MODI'S 25th edition at page '216' read as under:-

"The four middle pieces of the sternum, which constitute its body, fuse with one another from below upwards, between 14 and 25 years of age. The xiphoid unites with the body at about the 40th year of age, while the manubrium rarely unites with the body, except in old age. Singh et al. studied the time of fusion of mesosternum with manubrium and xiphoid process in the population of Punjab, Haryana and Chandigarh. They examined the sterna of 524 males and 228 females at the time of postmortems. It was observed that the fusion between mesosternum and manubrium began in the age group of 10-14 years (males, 40%) and 15-17 years (females, 16.66%). The fusion between mesosternum and xiphoid process commenced at 18-20 years (both genders) and complete fusion was observed in 21-25 years age group. They concluded that neither the fusion of mesostenum with manubrium nor with xiphoid process is useful to estimate age if a subject is above 18-20 years of age".

The X-ray report signed by the Senior Consultant,Radiologist,District Hospital,Agra is, thus, also found sketchy and as such can not be treated even a complete Ossification test for age determination as required under the medical jurisprudence.

22. This apart, the other factors which could have thrown light in the matter of determination of age have been completely ignored. The mother of the petitioner was examined as ACW1 by the Juvenile Justice

Board, Bulandshahr and was cross-examined by the Prosecution Officer on behalf of the applicant. Her statement extracted in the order of the Juvenile Justice Board disclosed that she has four children, two daughters and two sons, and the petitioner is youngest of them. The age of other siblings of the petitioner has not been disclosed by her nor any effort seems to have been made to extract the said fact during the course of her cross-examination by the Prosecution Officer or the Board, as nothing in this regard has been indicated in the order of the Juvenile Justice Board, Bulandshahr.

There is one more aspect of the matter that a perusal of the order dated 19.9.2018 further reflects that on the presentation of the application, notice was issued to the informant/complainant by the Board. There is no mention of service of notice upon the informant. Rather, a photostat copy of an affidavit of the informant and a certified copy of statement of PW-1 in Session Trial Court No. 360 of 2001 were filed by the counsel for the applicant, based on which it is recorded in the order of the Board that in the said affidavit and the statement,the informant had denied the presence of the accused at the site of the incident and had also entered into a compromise. It is not known as to how statement of PW-1 dated 12.5.2006 in Session Trial No. 360 of 2001 is relevant for this case wherein the petitioner was convicted in Session Trial No. 884 of 2000 arising out of Case Crime No. 33 of 2000. It is, thus, clear that the notice to the informant had not been given in the matter of enquiry in Misc. Case No. 19 of 2018 made by the Juvenile Justice Board, Agra. Irrelevant material such as the alleged affidavit of the informant filed before the Governor, State of U.P. as also the statement in some other criminal cases were considered. It is, thus, clear that a casual and cavalier approach had been adopted by the Juvenile Justice Board, Bulandshahr in making enquiry in the matter of determination of age. The relevant material which could bring the surrounding circumstances for determining the age of the accused have been completely ignored. Had the questions relating to age of elder siblings of the petitioner and difference in their age asked by the Board from his mother, answers to them might have thrown some light in regard to the estimated age of the petitioner. Being liberal in directing for the enquiry is another thing but at the stage of determination of age, decision has to taken on proper appreciation of evidence on the record and not on whims and fancies.

23. It may also be considered that the petitioner did not file appeal before the Supreme Court against the order of conviction and had directly approached the Juvenile Justice Board through the Legal Services Authority after a period of 15 years to get his age determined albeit under a general direction issued by this Court in a PIL. No doubt the standard of proof for age determination is the degree of probability and not proof beyond doubt. But the determination of age, in a given case, has to be made keeping in mind the object of the benevolent legislation, the Juvenile Justice Act, that all persons who were juvenile on the date of commission of offence should be given benefit of the Act but those who are taking plea of minor as a plea of alibi should be shown the doors at the threshold. It is settled legal position that all scrupulous claims of juvenility should be thrown at the threshold and genuine claims should be examined with a liberal approach. No doubt that a hyper technical approach in the matter of enquiry would

result in miscarriage of justice but a casual or cavalier approach in the matter of determination of age would result in travesty of justice, which according to us, has happened in this case.

24. In the words of R. Banumathi J. (as the Hon'ble Judge then was), speaking for the bench in **Mukarrab**13, a blind and mechanical view regarding the age of a person cannot be adopted solely on the basis of the medical opinion by the radiological examination. (Reference Para 26) (Emphasis supplied).

25. We, therefore, have no doubt in concluding that the proper procedure upholding the object of the Juvenile Justice Act has not been followed in the instant matter of determination of age of the petitioner. The ossification tests/radiological examination of the petitioner is not complete. The Juvenile Justice Board has committed a grave error of law in treating the radiological report as ossification test and making determination of age of the petitioner/applicant solely on the basis of that.

The decisions of the Apex Court in **Amit Singh**2 and the judgment of Punjab and Haryana High Court in **Gurdarshan Singh**3 relied by the learned counsel for the petitioner have been rendered in the facts and circumstances of those cases. No benefit can be derived by the petitioner on the basis of the same.

26. In view of the above discussions, three questions posed by us in this matter are answered in "Negative'. The writ of habeas corpus cannot be issued in the instant case to release the petitioner as his detention in the District Jail, Agra cannot be said to be illegal. No other instance of violation of fundamental rights of the petitioner (a prisoner in jail) could be placed before us. The order of determination of age of the petitioner passed by the Juvenile Justice Board, Bulandshahr is not sustainable in the eye of law. The Juvenile Justice Board had committed a grave error of law in not following the proper procedure in the matter of determination of age of the petitioner keeping in mind the object of the benevolent legislation namely the Juvenile Justice Act, in as much as, the appreciation of evidence was made in a cursory manner.

In view of the above observations, the habeas corpus petition is **dismissed.**

(2021)06ILR A511
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 29.06.2021

BEFORE

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

Habeas Corpus Writ Petition No. 16660 of 2020

Mohd. Sazid ...Petitioner
Versus
Suptt. District Jail, Lucknow & Ors. ...Respondents

Counsel for the Petitioner:
Manish Kumar Tripathi, Chandrakesh Mishra

Counsel for the Respondents:
G.A., Varun Pandey

National Security Act, 1980 – Section 3(2) - Detention order passed - of the-challenged-detention order served in jail-further extended for three months-six months from the date of initial detention-further extended-Representation moved for revocation of detention-not decided with expeition-State failed to decide the

representation-vitiates the detention order-quashed.

Petition allowed.(E-8)

List of Cases cited:

1. Rajammal Vs St.of T.N. & another reported in 1999 (1) SCC page 417

2. Ayya alias Ayub Vs St.of U.P. & another reported in AIR 1989 SC page 364,

3. Mohinuddin Vs District Magistrate, Beed & ors. reported in AIR 1987 SC page 1977

4. Satyapriya Sonkar Vs Superintendent, Central Jail, Naini & ors. reported in 2000 Cr.L.J. (Alld.) (DB)

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

1. The Court has convened through ***video conferencing***.

2. Heard Shri Daya Shankar Mishra, learned counsel for the petitioner, Shri S. P. Singh, learned A.G.A. for the State-respondents no.1, 2 and 3 and learned A.S.G. Senior Advocate Shri S. B. Pandey assisted by Shri Varun Pandey learned counsel for the Union of India.

3. The instant petition for habeas corpus has been preferred by the petitioner assailing his detention since 03.07.2020 in pursuance of the detention order passed by the respondent no.2 in exercise of powers conferred under Section 3(2) of the National Security Act, 1980.

4. The Court had required the State as well as the Union of India to file their counter-affidavits and in pursuance thereof the State as well as the Union of India have filed their respective counter-affidavits. The Union of India has also filed a supplementary counter-affidavit, to which the petitioner filed his rejoinder-affidavit.

5. From the record, it appears that an incident had taken place on 20.02.2020 in pursuance whereof a First Information Report was also lodged bearing Case Crime No.74 of 2020 under Sections 302, 394, 216-A, 120-B/34 I.P.C. and Section 7 of Criminal Law Amendment Act relating to Police Station Chowk, District Lucknow.

6. The alleged incident as described is that on 20.02.2020, four men who had covered their faces with mask and were wearing helmet at around 1.30 P.M., entered the shop of a wholesale stockist of Kamlapasand and Supari situate in the busy market area of Yayaganj, having fire arms with them and forcibly took away two packets, one carrying cash and the other having keys to a cupboard and when an employee of the firm Subhash Chandra Gupta resisted, they fired at him and fled from the scene on two motorcycles. The said employee who was shot at, died during his treatment.

7. The State Government considering the facts and circumstances and the material before it approved the detention order passed by the detaining authority under Section 3(5) of the National Security Act, 1980. The detention order dated 03.07.2020 was served on the petitioner in jail through Superintendent District Jail, Lucknow-respondent no.1. Subsequently, after the detention order was approved from the Advisory Board Committee, it was further extended for another period of three months i.e. six months from the date of initial detention and later the same was further extended.

8. It is in the aforesaid backdrop that the petitioner has instituted the above petition for habeas corpus challenging the detention order to be illegal and seeks his released forthwith.

9. The submission of the learned counsel for the petitioner is that the petitioner had moved a representation dated 13.07.2020 for seeking revocation of his detention through respondent No.1 Superintendent, District Jail, Lucknow which was addressed to the District Magistrate. The said representation was received by the respondent no.1 on 15.07.2020 and the same was rejected by the State Government on 28.07.2020. The petitioner has brought the representation dated 13.07.2020 on record as annexure no.12. The rejection order passed by the State Government dated 28th of July, 2020 has been brought on record as annexure no.13.

10. The petitioner thereafter preferred another representation addressed to the Advisory Board Committee, the Central Government as well as the State Government dated 21st July, 2020. It is the specific case of the petitioner as pleaded in paragraph-40 of the writ petition that despite the representation dated 21.07.2020 having been served on the Authorities yet the same has not been decided with expedition which has rendered the detention of the petitioner bad in the eyes of law, hence the petition be allowed.

11. Learned A.G.A. Shri S. P. Singh while refuting the aforesaid submissions has urged that the petitioner is involved in commission of a heinous crime. It is only after considering the dossier prepared relating to the petitioner, a copy of which has been brought on record as annexure C.A. No.1 with the counter-affidavit dated 09.11.2020, submits that there is ample material to form the subjective satisfaction that in order to prevent the petitioner from acting in any manner prejudicial to the maintenance of public order and authority, it was necessary to detain the said person and the detention order dated 03.07.2020 was passed.

12. It is also urged that the State thereafter complied with the time line as provided in Section 3(4) and (5) of the Act, 1980 scrupulously and there is no illegality committed at any stage of proceedings. Moreover, the representation dated 13.07.2020 was rejected hence the subsequent representation on similar facts dated 21.07.2020 was not maintainable. Accordingly, the writ petition deserves to be dismissed.

13. Learned A.S.G., Senior Advocate Shri S. B. Pandey submits that even the representation which was forwarded to the Central Government (dated 13.07.2020 which was received by the Authority on 15.07.2020) was rejected on 26.08.2020 and the same was communicated to the detenue (the petitioner) on 31.08.2020 and thus on the strength thereof it is urged that the representation was decided without much delay, through the delay, if any, has been explicitly explained, hence there is no violation of any provision of the Act. Consequently the writ petition deserves to be dismissed.

14. Shri Daya Shankar Mishra, learned counsel for the petitioner while refuting the submission in rejoinder has specifically drawn the attention of the Court to the averments contained in paragraph 40 of the writ petition and it has been submitted that the earlier

representation dated 13.07.2020 which was received by the authority on 15.07.2020 was rejected by the State Government on 28.07.2020 and the Central Government rejected the same on 26.08.2020 which was communicated to the petitioner on 31.08.2020. However, it is urged that in so far as the subsequent representation dated 21.07.2020 is concerned, the same has not been decided by the Central Government till date. He further submits that there is no bar for the petitioner to move a subsequent representation though the subject matter of both the representation was different.

15. It is also urged that even the State Government who was seized of the said representation did not decide the same and only as late as on 10.06.2021 the same was decided by the State Government much after exchange of the pleadings in the instant petition and submits that in view of the decisions of the Apex Court in the case of (i) ***Rajammal Vs. State of Tamil Nadu & another reported in 1999 (1) SCC page 417***,(ii) ***Ayya alias Ayub Vs. State of U.P. & another reported in AIR 1989 SC page 364***, (iii) ***Mohinuddin Vs. District Magistrate, Beed & other reported in AIR 1987 SC page 1977*** and (iv) referring to the case of ***Satyapriya Sonkar Vs. Superintendent, Central Jail, Naini & other reported in 2000 Cr.L.J. (Alld.) (DB)***, the detention order stands vitiated and the petition deserves to be allowed.

16. The Court has considered the submissions and also perused the record.

17. As far as the facts are concerned, the same are not much in dispute. It is not disputed that the provisions of the National Security Act, 1980 has been invoked against the petitioner on the basis of a solitary case i.e. Case Crime No.74/2020. The petitioner has been in jail since 06.03.2020 and during this period the detaining authority has passed the detention order. It is also not disputed that during this detention the petitioner had initially preferred the representation dated 13.07.2020, a copy of which has been brought on record as annexure no.12. It is also not disputed by the petitioner that in so far as the said representation is concerned, the same was rejected by the State Authority on 28th of July, 2020 and it reveals from the counter-affidavit filed by Union of India dated 25.03.2021 that the representation dated 13.07.2020 which was received by the authority on 15.07.2020 was decided by the Central Government Authority on 26.08.2020 which was communicated to the detenue i.e. the petitioner on 31.08.2020.

18. From the perusal of the counter-affidavit filed by the Union of India, it indicates that an attempt has been made by the Central Government to justify the delay in deciding the representation. In paragraph 5 (a) to 5 (d) various dates have been mentioned which only indicates the movement of file from one desk to the other which only further amplifies the bureaucratic/redtapism in the movement of the files, without considering that the issue of detention is a priority and the matter should have received prompt attention.

19. Be that as it may, the second representation dated 21.07.2020, a copy of which has been brought on record as annexure no.16 and addressed to the Advisory Board Committee, the State Government as well as the Central Government concerned. The State by filing its counter-affidavit dated 23.11.2020 in paragraphs-6 and 7 has clearly stated that the said representation dated 15.07.2020

was considered by the authority and rejected by the State Government on 28.07.2020. However, in so far as the representation dated 21.07.2020 addressed to the Central Government is concerned, there is nothing on record to indicate that the said representation was decided. A specific query was put to the learned A.S.G. in this regard who responded by saying that as per his instructions, representation dated 21.07.2020 was never received by the Central Government Authority.

20. This Court is not inclined to accept this reply; inasmuch as right from the inception, a specific averment was made in paragraph-40 of the writ petition regarding the fact that the representation dated 21.07.2020 was sent to the Authority which has not been decided which has vitiated the detention order.

21. Yet there has been no reply to the aforesaid paragraph though the Central Government filed its counter-affidavit on 18.02.2021. Subsequently another counter-affidavit was filed by the Central Government dated 25.03.2021 and yet again there is neither any categorical reply to paragraph-40 of the writ petition nor any plea was raised by stating on oath in the counter-affidavit that the Central Government did not receive the representation dated 21.07.2020.

22. Thus what transpires from the record is that in so far as the first representation dated 13.07.2020 is concerned (received by the Authority on 15.07.2020), the same came to be decided both by the State Government as well as by the Central Government though the Central Government pushed the file in a casual manner.

23. However, in so far as the subsequent representation dated 21.07.2020 is concerned, the same came to be decided by the State Government only on 10.06.2021 i.e. almost after 10 months and there is no explanation forthcoming for this humongous delay. So also there is nothing on record to indicate that the same was decided by the Central Government till date.

24. Noticing the dictum of the Apex Court in the case of **Mohinuddin (supra),** the relevant portion as contained in para 6 and 7 of the said report is being reproduced for convenient reference:-

"....6. It is somewhat strange that the State Government should have acted in such a cavalier fashion in dealing with the appellant's representation addressed to the Chief Minister. We are satisfied that there was failure on the part of the Government to discharge its obligations under Art. 22 (5). The affidavit reveals that there were two representations made by the appellant, one to the Chief Minister dated September 22, 1986 and the other to the Advisory Board dated October 6, 1986. While the Advisory Board acted with com- mendable despatch in considering the same at its meeting held on October 8, 1986 and forwarded its report together with the materials on October 13, 1986, there was utter callousness on the part of the State Government to deal with the other representation addressed to the Chief Minister. It was not till November 17, 1986 that the Chief Minister condescended to have a look at the representation. When the life and liberty of a citizen is involved, it is expected that the Government will ensure that the constitutional safeguards embodied in Art. 22 (5) are strictly observed. We say and we think it necessary to repeat that the

gravity of the evil to the community resulting from anti-social activi- ties can never furnish an adequate reason for invading the personal liberty of a citizen, except in accordance with the procedure established by the Constitution and the laws. The history of personal liberty is largely the history of in- sistence on observance of the procedural safeguards.

7. Apart from the admitted inordinate delay, there is a fundamental defect which renders the continued detention of the appellant constitutionally invalid. As observed by one of us (Sen, J.) in Narendra Purshotam Umrao V. B.B. Gujral & Ors. , [1979] 2 SCC 637 there was a duty cast on the Govern- ment to consider the representation made by the detenu without waiting for the opinion of the Advisory Board. The constitution of.an Advisory Board undern s.9 of the Act does not relieve the State Government from the legal obligation to consider the representation of the detenu as soon as it is received by it. It goes without saying that the constitu- tional right to make a representation guaranteed by Art. 22 (5) must be taken to include by necessary implication the constitutional right to a proper consideration of the repre- sentation by the authority to whom it is made. The right of representation under Art. 22 (5) is a valuable constitutional right and is not a mere formality. The representation made by the appellant addressed to the Chief Minister could not lie unattended to in the portals of the Secretariat while the Chief Minister was attending to other political affairs. Nor could the Government keep the representation in the archives of the Secretariat till the Advisory Board submit- ted its report. In Narendra'Purshotam Umrao's case it was observed: "Thus, the two obligations of the Government to refer the case of the detenu to the Advisory Board and to obtain its report on the one hand, and to give an earliest opportunity to him to make a representation and consider the representation on the other, are two distinct obligations, independent of each other." After referring to the decisions of this Court in Abdul Karim V. State of West Bengal, [1969] 3 SCR 479; Pankaj Kumar Chakrabarty V. State of West Bengal, [1970] 1 SCR 543 and Khairul Haque v. State of West Bengal, W.P. No. 246 of 1969, decided on September 10, 1969 the nature and dual obligation of the Government and the corresponding dual right in favour of the detenu under Art. 22 (5) was reiterat- ed. The following observations of the Court in Khairul Haque's case were quoted with approval:

"It is implicit in the language of Art. 22 that the appropriate Government, while dis- charging its duty to consider the representa- tion, cannot depend upon the view of the Board on such representation. It has to consider the representation on its own without being influ- enced by any such view of the Board. There was, therefore, no reason for the Government to wait for considering the petitioner's representation until it had received the report of the Advisory Board. As laid down in Abdul Karim V. State of West Bengal, the obli- gation of the appropriate Government under Art. 22(5) is to consider the representation made by the detenu as expeditiously as possi- ble. The consideration by the Government of such representation has to be, as aforesaid, independent of any opinion which may be ex- pressed by the Advisory Board.

The fact that Art. 22 (5) enjoins upon the detaining authority to afford to the detenu the earliest opportunity to make a representation must implicitly mean that such representation must, when made, be considered and disposed of as expeditiously

as possible, otherwise, it is obvious that the obligation to furnish the earliest opportunity to make a representation loses both its purpose and meaning."

In the circumstances, there being a failure on the part of the State Government to consider the representation made by the appellant addressed to the Chief Minister without wait- ing for the opinion of the Advisory Board, renders the continued detention of the appellant invalid and constitu- tionally impermissible."

25. The Apex Court in the case of **Rajammal (supra)** in para 6 to 8 has held as under:-

"6. Learned counsel also cited an earlier two-Judge Bench decision of this Court in Raghavendra Singh v. Supdt., District Jail, Kanpur [(1986) 1 SCC 650 : 1986 SCC (Cri) 60] in which similar delay of a few days in considering the representation was found to have vitiated the detention. That is a case where delay was held to be "wholly unexplained". A three-Judge Bench of this Court in Rumana Begum v. State of A.P. [1993 Supp (2) SCC 341 : 1993 SCC (Cri) 551] disapproved the delay in considering the representation on the mere ground that the representation was not addressed to the Chief Secretary. That was a case where representation was sent to the Governor. Hence it was found that there was unexplained and unreasonable delay and consequently the detention was held vitiated. We are reminded of the following observations made by this Court in Kundanbhai Dulabhai Sheikh v. District Magistrate, Ahmedabad [(1996) 3 SCC 194 : 1996 SCC (Cri) 470 : JT (1996) 2 SC 532] : (SCC p. 203, para 21)

"21. In spite of law laid down above by this Court repeatedly over the past three decades, the Executive, namely, the State Government and its officers continue to behave in their old, lethargic fashion and like all other files rusting in the Secretariat for various reasons including red-tapism, the representation made by a person deprived of his liberty, continue to be dealt with in the same fashion. The Government and its officers will not give up their habit of maintaining a consistent attitude of lethargy. So also, this Court will not hesitate in quashing the order of detention to restore the "liberty and freedom' to the person whose detention is allowed to become bad by the Government itself on account of his representation not being disposed of at the earliest."

7. It is a constitutional obligation of the Government to consider the representation forwarded by the detenu without any delay. Though no period is prescribed by Article 22 of the Constitution for the decision to be taken on the representation, the words "as soon as may be" in clause (5) of Article 22 convey the message that the representation should be considered and disposed of at the earliest. But that does not mean that the authority is pre-empted from explaining any delay which would have occasioned in the disposal of the representation. The court can certainly consider whether the delay was occasioned due to permissible reasons or unavoidable causes. This position has been well delineated by a Constitution Bench of this Court in K.M. Abdulla Kunhi v. Union of India [(1991) 1 SCC 476 : 1991 SCC (Cri) 613] . The following observations of the Bench can profitably be extracted here: (SCC p. 484, para 12)

"It is a constitutional mandate commanding the authority concerned to whom the detenu submits his representation to consider the representation and dispose of the same as expeditiously as possible.

The words "as soon as may be' occurring in clause (5) of Article 22 reflects the concern of the Framers that the representation should be expeditiously considered and disposed of with a sense of urgency without an avoidable delay. However, there can be no hard and fast rule in this regard. It depends upon the facts and circumstances of each case. There is no period prescribed either under the Constitution or under the detention law concerned, within which the representation should be dealt with. The requirement, however, is that there should not be supine indifference, slackness or callous attitude in considering the representation. Any unexplained delay in the disposal of representation would be a breach of the constitutional imperative and it would render the continued detention impermissible and illegal."

8. The position, therefore, now is that if delay was caused on account of any indifference or lapse in considering the representation, such delay will adversely affect further detention of the prisoner. In other words, it is for the authority concerned to explain the delay, if any, in disposing of the representation. It is not enough to say that the delay was very short. Even longer delay can as well be explained. So the test is not the duration or range of delay, but how it is explained by the authority concerned.

26. A Co-ordinate Bench of this Court in the case of **Satyapriya Sonkar (supra)** in para 16 to 18 has noticed as under:-

"16. Questions No. 2, 3 and 4 are related to each other and can be conveniently considera and decided together. There is no doubt about the legal position that the right of representation against preventive detention is constitutional and safeguard provided under Article 22(5) of the Constitution in Section 8 of the Act is only extention of the same right. The detaining authority is required to afford the detenu earliest opportunity of making representation against the order to the appropriate government. The representation so made has to be forwarded to the Advisory Board while making the reference under Section 10 of the Act. It is also to be considered by the State Government (appropriate government) at the earliest. In addition to the aforesaid right petitioner has also a remedy under Section 14 of the Act under which Central Government and the State Government may revoke the order of detention. The relief under Section 14 of the Act may be claimed at any namely before the order of detaining authority is confirmed by the State Government under Section 12 of the Act or subsequent there to. Thus from the provisions of Act, it is clear that the right to make representation by the detenu is not confined under Section 8 only. The detenu may make a second representation to the State Government and the Central Government under Section 14 of Act for invoking the power of revocation. Thus the detenu can make representation more than once during the period he is under detention. Whether the successive or frequent representations amount to abuse of the right conferred under the provisions of the Act, can be dealt with by the State Government and the Central Government and not by any other authority. The submission of the learned A.G.A. was that the subsequent representations can be permitted only on the basis of fresh ground which were not available at the time the first representation was made. The analogy behind this submission appears to be based on the doctrine of constructive res judicata. A Division Bench of this Court in case of Sushil Kumar V. Adhiskshak, Kendriya

Karagar, Naini Allahabad, 1983 Cri LJ 744 held that the application of the doctrine of constructive res judicata is confined only to civil action and is entirely inapplicable to any illegal detention and do not bar a subsequent petition for a writ of habeas corpus. The Court also observed that Section of the Act providing for revocation or modification, has a very wide scope which is not the position in the matter of habeas Corpus before the Court.. The relevant extract from judgment is being reproduced below :-

"..... When a detention is challenged before a Court, the Court considers whether legal imperatives have been observed and the right procedure has been followed and the proper opportunity, as envisaged in Article 22 (4) of the Constitution as well as under the provisions of the Act in question, has been afforded. The Court does not examine the desirability of the detention of the detenu, which depends on so many other factors including conditions prevailing in any particular region and the need of the detention, the matter comes within the ambit of subjective satisfaction of the detaining authority. Besides, while the Court cannot modify the order as to reduce the period of detention etc. even that scope is open to the appropriate authority under Section 14 of the Act.

17. Hon'ble Supreme Court in case of Sabir Ahmed V. Union of India, 1980 (3) SCC 295 in paragraph No. 12 while repelling the contention of the Central Government that it is not under duty to consider a representation made to it by the detenu for revoking his detention, if it simply repeats the same allegations, statement of facts and arguments which may be contained in the representation made to the detaining authority, held as under :-

It is true that Section 3(2) of COFEPOSA mandates the State Government to send a report to the Central Government. But it does not mean that the representation made by the detenu, if any, should also be sent along with that report. There appears to be no substance in the contention that the Central Government is under no duty to consider a representation made to it by the detenu for revoking his detention, if it simply repeats the same allegations, statement of facts, and arguments which were contained in the representation made to the detaining authority. It is common experience that an argument or submission based on certain facts, which does not appeal to a tribunal or authority of first instance, may find acceptance with a higher tribunal or supervisory authority. Whether or not the detenu has under Section 11 a legal right to make a representation to the Central Government is not the real question. The nub of the matter is whether the power conferred by Section 11 on the Central Government, carries with it a duty to consider any representation made by the detenu, expeditiously. The power under Section 11 may either be exercised on information received by the Central Government from its own sources in eluding that supplied under Section 3 by the State Government, or, from the detenu in the form of a petition or representation. Whether or not the Central Government on such petition/representation revokes the detention is a matter of discretion. But this discretion is coupled with a duty. That duty is inherent in the very nature of the jurisdiction. The power under Section 11 is a supervisory power. It is intended to be an additional check or safeguard against the improper exercise of its power of detention by the detaining authority or the State Government. If this statutory safeguard is

to retain its meaning and efficacy, the Central Government must discharge its supervisory responsibility with constant vigilance and watchful care. The report received under Section 3 or any communication or petition received from the detenu must be considered with reasonable expedition. What is 'reasonable expedition' is a question depending on the circumstances of the particular case. No hard and fast rule as to the measure of reasonable time can be laid down. But it certainly does not cover the delay due to negligence, callous inaction, avoidable redtapism and unduly protracted procrastination.

18. From the aforesaid legal position expressed by Hon'ble Supreme Court about the representation, it is clear that the second or successive representation may be made by the detenu during the period of his detention and such representations are to be considered and decided expeditiously. The provisions of COFEPOSA in this regard are similar to Act. The contention of the learned A.G.A. was that the representation dated 12th June, 1999 contained similar allegations, as were made in the representation dated 18th June, 1999 by the petitioner and hence no prejudice has been caused to petitioner as earlier the representation was already rejected by the Central Government. But this submission can not be accepted in view of the legal position expressed by Hon'ble Supreme Court in Sabir Ahmed's case, (1980 (3) SCC 295) wherein it has been held that it is common experience that an argument or submission based on certain facts, which does not appeal to a tribunal or authority of first instance, may find acceptance with a higher tribunal or supervisory authority. This analogy may be applicable to the same authority as well. It is well known that an authority or Court which at first instance does not accept the submission, on re-hammer accepts the same on subsequent occasion. From the aforesaid observations, it is clear that the representation submitted to the Central Government or the State Government even if it is based on same ground, it cannot be ignored and has to be considered by the appropriate authority. The observations of the Division Bench in case of Sushil Kumar, (1983 Cri LJ 744) (supra) are also very material. The power under Section 14 of the Act, conferred on State Government and Central Government is very wide and they can revoke order of detention for various considerations. They may come to conclusion that the preventive detention is no longer necessary, looking to the incident of the present case on which basis the impugned order of detention was passed, was related to the use of unfair means during examination. Admittedly, examinations were over long back. This could, by lapse of time, be one of the important consideration for the State Government and Central Government to revoke the order of detention on the ground that its purpose has already been served. But if the representations are allowed to be ignored in the manner it has been done in the present case it shall defeat the very purpose for which the right of representation has been conferred on the detenu. We have already found that the representations sent by father of the petitioner on 27th June, 1999 were served on the State Government as well as on the Central Government but they have not been considered and decided though more than three months have passed. In our opinion, for this lapse on the part of the respondents No. 3 and 4, the continued detention of petitioner has been rendered illegal."

27. In view of the settled position of law as noticed above and its application to the facts of the instant case, there is no doubt that the State failed to discharge its

obligation in deciding the representation expeditiously and moreover the Central Government has not decided the representation dated 21.07.2020 till date which is fatal and vitiates the detention order.

28. In view of the aforesaid facts and the law noticed above, the writ petition **succeeds** and the detention order is quashed. The petitioner shall be released forthwith by the respondents unless he is required in any other case.

29. In the facts and circumstances, there shall be no order as to costs.

30. 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.

31. 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)06ILR A521
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 03.06.2021

BEFORE

THE HON'BLE JASPREET SINGH, J.

S.C.C. Revision No. 29 of 2020

Vishwa Gaurav Pandey ...Revisionist

Versus

Dr. Smt. Sangeeta Agarwal & Anr. ...Opp. Parties

Counsel for the Revisionist:
Apoorva Tewari, Akash Singh

Counsel for the Opp. Parties:
Prashant Singh Gaur

Suit decreed in landlord's favour-original tennant shifted and inducted her relatives - without informing plaintiff landlord-tenant disputed the amount of rent and extent of accomodation-but failed to lead any evidence-impugned order does not suffers from any error.

Held, *The power under Section 25 of the Provincial Small Cause Court Act empowers the Court to examine whether in the impugned judgment there has been any violation of any statutory provision or the judgment suffers from misreading of any evidence or omission to consider any relevant and clinching evidence or where the inference drawn from the facts proved is such that no reasonable person can arrive at such findings*. **(para 26)**

Revision dismissed.(E-8)

List of Cases cited:

1. M/s Technician Studio Pvt. Ltd. Vs Smt. Lila Ghosh & anr., 1978 Allahabad Rent Cases, 220

2. Sanvarmal Kejriwal Vs Vishwa Cooperative Housing Society Ltd. & ors. reported in 1990 (2) SCC 288

3. Mani Nariman Daruwala @ Bharucha Vs Phiroj N. Bhatena & ors. reported in 1991 (3) SCC 141

4.Harshwardhan Chokkani Vs Bhupendra N. Patel & ors. reported in 2002 (3) SCC 626

5. Park Street Properties Private Ltd. Vs Deepak Kumar Singh & anr. reported in 2016 (9) SCC 268

6. Jhabbu Lal Vs District Judge, Dehradun & ors. reported in 1998 (2) ARC 558

7. Raghu Nath Goyal Vs Yogendra Singh Nehru reported in 2015 (4) ADJ 168

8. Anthony Vs K.C. Itoop & Sons & ors. reported in 2000 (6) 394

9. Trilok Singh Chauhan Vs Ram Lal & ors. reported in 2018 (2) SCC 566

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

1. The instant revision has been preferred under Section 25 of the Provincial Small Cause Court Act, 1887 against the judgment and decree dated 11.11.2019 passed in SCC Suit No. 213 of 2014 (Dr. Smt. Sangeeta Agarwal and Another Vs. Vishva Gaurav Pandey) by means of which the suit of the plaintiffs-respondents has been decreed granting the relief of arrears of rent and ejectment by the Court of Special Judge, P.C. Act, Court No. 5, Lucknow acting as Judge Small Cause Court.

2. Briefly, the facts giving rise to the instant revision are as under:-

3. That the plainitiff-respondents instituted SCC Suit No. 213 of 2014 against Sri Vishva Gaurav Pandey seeking a decree of arrears of rent and ejectment as well as damages for wrongful use and occupation.

4. It was pleaded that the ground floor portion comprising of 3 living rooms, hall, lobby, porch and front open space in House No. 75, Ravindra Palli, Faizabad Road, Lucknow was initially let out to Smt. Garima Pandey, the sister of the defendant. The premises was let out on a monthly rent of Rs. 6,500/- excluding electricity, water tax and other charges. It was also pleaded that with mutual consent the monthly rent was enhanced to Rs. 9,000/- per month.

5. In paragraph 3 and 4 of the plaint, it has been stated that the defendnat (Vishva Gaurav Pandey) started tendering the cheques in his own name since January, 2013. It was later discovered that Smt. Garima Pandey after marriage had shifted elsewhere without informing the plaintiffs and during her stay she inducted her relatives including the defendant in an unauthorized manner. It was also stated that only when the cheque for the rent relating to the month of March, 2014 was dishonoured and the plaintiffs went to the premises that they realised that they had been accepting the rent from the defendant.

6. It was also pleaded that the defendant (Vishva Gaurav Pandey) had instituted a suit for injunction in the Court of Civil Judge, Junior Division, Hawali, Lucknow on 22.04.2014 on false pretext. The plaintiff's since were receiving the rent from the defendant, therefore, treating the defendant as the tenant and the fact that the rent was in excess of Rs. 2,000/-,hence, by means of notice dated 19.08.2014 terminated the tenancy and thereafter instituted the suit against the defendant.

7. The said suit was contested by the defendant by filing his written statement wherein he took the defence that he was only the tenant of one room situate on the ground floor whereas the wash room, lobby and the Angan was in common use of the defendant with other tenants. The defendant pleaded that he was a tenant of Rs. 1,600/- per month along with Rs. 100/- towards water charges, thus, a total sum of Rs. 1,700/- was paid as rent by the defendant to Dr. Sangeeta Agarwal, the plaintiff no. 1.

8. He also pleaded that the defendant was only the tenant of Dr. Sangeeta

Agrawal and Dr. Atul Agarwal, the plaintiff no. 2 has been wrongly impleaded in the above suit. It was further pleaded that since the rate of rent was only Rs. 1700/- per month and the building was old, hence, it was covered by the provisions of Uttar Pradesh Regulation of Letting of Rent and Eviction Act, 1972 (hereinafter referred to as the Act No. 13 of 1972). The defendant also submitted that he had deposited the arrears in terms of Section 20 (4) of the U.P. Act No. 13 of 1972 and as such was entitled to the benefit of the aforesaid provision, relieving him from the decree of ejectment.

9. Insofar as the service of composite notice of demand and ejectment dated 19.08.2014 is concerned, the same was served on the defendant, however, it was assailed on the ground that it did not relate to the portion of which the defendant was a tenant rather it related to a much larger area, hence, the notice was bad.

10. Before the Trial Court, it is only the plaintiff no. 2 Dr. Atul Agarwal who appeared as a witness whereas none appeared on behalf of the defendant nor the defendant examined himself before the Court. The Trial Court by means of judgment dated 11.11.2019 considering the respective contention of the parties decreed the suit for the relief of arrears of rent, ejectment as well as damages for wrongful use and occupation.

11. The defendant being aggrieved against the aforesaid judgment has knocked the doors of this Court.

12. Sri Apoorva Tiwari, learned counsel for the revisionist has assailed the impugned judgment on primarily three grounds;

(i) It has been urged that the jurisdiction of the Court is determined on the basis of the allegations made in the plaint. Since in paragraphs 3 to 5 of the plaint, it was alleged by the plaintiffs that the property in question was initially leased out to Smt. Garima Pandey and that Smt. Garima Pandey had left the premises without informing the plaintiffs and during her stay, she unauthorisedly inducted the defendants and her near relatives.Thus, as per the allegations in the plaint, the status of the defendant was that of an unauthorized occupant and such a suit by the owner against an unauthorized occupant was not maintainable before the Judge, Small Cause rather the plaintiffs ought to have instituted the suit before the Civil Court on the regular side. Thus the decree suffered from the vice of jurisdictional error hence a nullity.

(ii) It is also urged that from the plaint averment, no relationship of landlord and tenant was made out since it was pleaded by the plaintiffs that they had been accepting the rent under the impression that the amount was being tendered to them by Smt. Garima Pandey. Thus, for the said reason, when there was no relationship of landlord and tenant between the plaintiff and defendant thus for the said reason also the suit was apparently not between the lessor and lessee, consequently, the suit was not maintainable and was hit by the provisions of Section 15 of the Provincial Small Cause Court Act.

(iii) It is also been feebly argued that the revisionist-defendant was not granted adequate opportunity to contest the case and that certain documents were filed by the plaintiffs which though were taken on record but opportunity was not granted to the revisionist to rebutt the same or to lead oral evidence in respet thereto. Thus, for all the reasons as mentioned above, it was

urged that the judgment and decree passed by the SCC Court dated 11.11.2019 was bad in the eyes of law and was liable to be set aside.

13. Sri Tiwari in support of his submissions has relied upon the following decisions:

(i) M/s Technician Studio Pvt. Ltd. Vs. Smt. Lila Ghosh and Another, 1978 Allahabad Rent Cases, 220 (ii) Sanvarmal Kejriwal Vs. Vishwa Cooperative Housing Society Ltd. and Others reported in ***1990 (2) SCC 288 (iii) Mani Nariman Daruwala Alias Bharucha Vs. Phiroj N. Bhatena and Others*** reported in ***1991 (3) SCC 141 (iv) Harshwardhan Chokkani Vs. Bhupendra N. Patel and Others*** reported in ***2002 (3) SCC 626.***

14. At this stage, it will be relevant to notice that the decisions of the Apex Court in the case of Sanvarmal Kejriwal (supra) and Mani Nariman Daruwala (supra) both are on the proposition that the jurisdiction of the Court in which the action was originated must be determined on the basis of the averments in the plaint whereas the other two decisions in the Case of M/s Technicians Studio Pvt. Ltd and Harshwardhan Chokkani (supra) both are on the proposition that mere payment of rent in itself does not create a tenancy.

15. Per contra, Sri Prashant Singh Gaur, learned counsel appearing for the plaintiffs-respondents while refuting the submissions of the learned counsel for the revisionist submits that the averments of the plaint must be read as a whole. It is not permissible to cull out sentences or read certain paragraphs in isolation. It is further urged that from a complete and meaningful reading of the plaint, it would indicate that the plaintiffs-respondents had pleaded with sufficient particularity that initially the premises in question which was described in the plaint was let out to Smt. Garima Pandey who is none other than the sister of the defendant. She was initially paying the rent of Rs. 6,500/- which later with passage of time was enhanced to Rs. 9,000/- per month. The plaintiffs had also accepted the rent by way of cheque which was issued by the defendant, however, the plaintiffs were under the impression that it was on behalf of Smt. Garima Pandey. On one occasion when the cheque for the rent of the month of March, 2014 was dishonoured that the plaintiffs-respondents realised that Smt. Garima Pandey was married and had left the premises while it was in occupation of the defendant who had been paying the rent.

16. It has further pleaded that the defendant accepted the defendant as his tenant moreover the defendant also instituted a suit for injunction before the Civil Court on incorrect facts but he pleaed himself to be a tenant but of a lesser portion and at a much lower rate of rent. In the aforesaid backdrop, the plaintiff-respondents after serving a composite notice of demand and ejectment terminated the tenancy and instituted the suit for arrears of rent, ejectment and damages for wrongful use and occupation.

17. Such a suit being between the lessor and the lessee was cognizable by the Judge, Small Causes and thus the question of jurisdiction being raised by the defendant-revisionist is misconceived as the plaint clearly demonstrates the defendant being the tenant who had paid rent to the plaintiffs, hence, this apart from being an admission now the defendant cannot resile and assail the jurisdiction by raising a frivilous plea.

18. It is further urged by Sri Gaur that the defendant himself admitted in the written statement that he was a tenant and paying the rent to the plaintiff Dr. Sangeeta Agarwal. Once the relationship of landlord and tenant is admitted in the pleadings and such an admission is neither retracted or explained to mean otherwise, hence, at this stage, it is not open for the revisionist to urge that there is no relationship of landlord and tenant and the SCC Court did not have the jurisdiction.

19. It is also urged that ample opportunity was granted to the defendant to contest the case apart from filing the written statement. The defendant did not make any endevour to examine himself or any witness on his behalf. The assertion that certain documents were filed which were taken on record and opportunity was not granted to the defendant is also incorrect, inasmuch as, none of those alleged documents find place in the reasons recorded by the trial Court in its judgement, hence, no prejudice has been caused to the defendant.

20. Apart from the fact that from the perusal of the record of the order sheets of the Trial Court would reveal that the defendants made several applications one after the other which all came to be dismissed with the sole intention of delaying the proceedings and the same was also noticed by the Trial Court. At one point of time, the proceedings were also transferred from one Court to the other and even when the judgment was reserved by the Trial Court, the defendant left no stone unturned to further delay and made an application which was decided by the Trial Court and the reference of which is contained in the judgment itself. For the aforesaid reasons, the decision of the Trial Court does not suffer from any jurisdictional error nor the same requires any interference from this Court in exercise of powers conferred under section 25 of the Provincial Small Causes Court.

21. The learned Counsel for the respondents has relied upon the following decisions:-

(i) Park Street Properties Private Ltd. Vs. Deepak Kumar Singh and Another reported in ***2016 (9) SCC 268, (ii) Jhabbu Lal Vs. District Judge, Dehradun and Others*** reported in ***1998 (2) ARC 558 (iii) Raghu Nath Goyal Vs. Yogendra Singh Nehru*** reported in ***2015 (4) ADJ 168 (iv) Anthony Vs. K.C. Itoop & Sons and Others*** reported in ***2000 (6) 394.***

22. Sri Gaur has relied upon the decisions of Park Street Properties Pvt. Ltd. (supra) and Anthony (supra) to buttress his submissions that where a lease is in respect of a property, the same can be made expressly or by implication. Also that in absence of any registered instrument, the Courts have ample power to determine the factum of tenancy from other evidence as well as conduct of the parties.

23. As far as the decisions of Jhabbu Lal (supra) is concerned, it has been cited to urge that the tenancy can be created by implied consent and that there may be a case where they may not be an express agreement between the parties yet if the occupant by his own conduct treats himself to be the tenant and the rent is accepted by the landlord in such circumstances, the tenancy would be created by the parties. So also the decision of the Raghhunath Goyal (Supra) has been cited for the aforesaid proposition.

24. The Court has considered the rival submissions and also perused the material available on record.

25. At the very outset, it may be noticed that this Court is exercising jurisdiction under Section 25 of the Provincial Small Cause Court Act and it will be necessary to notice the scope and width of the aforesaid jurisdiction.

26. The power under Section 25 of the Provincial Small Cause Court Act empowers the Court to examine whether in the impugned judgment there has been any violation of any statutory provision or the judgment suffers from misreading of any evidence or omission to consider any relevant and clinching evidence or where the inference drawn from the facts proved is such that no reasonable person can arrive at such findings.

27. The power under Section 25 of the Provincial Small Cause Court Act though is wider than Section 115 C.P.C. but the very nature of the revisional power is that it is truncated. The Apex Court in the case of ***Trilok Singh Chauhan Vs. Ram Lal and Others*** reported in ***2018 (2) SCC 566*** had the occasion to consider the scope of the revisional powers under Section 25 of the Provincial Small Cause Court Act and by relying upon an earlier decision of the Apex Court in the case of Hari Shanker Vs. Rao Girdhari Lal Chaudhary reported in AIR 1963 SC 698 and a subsequent decision of Mundrilal Vs. Sushila Rani reported in 2007 (8) SCC 609, in paragraphs 15 and 16 has held as under:-

15. The scope of Section 25 of the 1887 Act, came for consideration before this Court on several occasions. In Hari Shankar v. Rao Girdhari Lal Chowdhury [Hari Shankar v. Rao Girdhari Lal Chowdhury, AIR 1963 SC 698] , in paras 9 and 10, this Court laid down the following: (AIR p. 701)

"9. The section we are dealing with, is almost the same as Section 25 of the Provincial Small Cause Courts Act. That section has been considered by the High Courts in numerous cases and diverse interpretations have been given. The powers that it is said to confer would make a broad spectrum commencing, at one end, with the view that only substantial errors of law can be corrected under it, and ending, at the other, with a power of interference a little better than what an appeal gives. It is useless to discuss those cases in some of which the observations were probably made under compulsion of certain unusual facts. It is sufficient to say that we consider that the most accurate exposition of the meaning of such sections is that of Beaumont, C.J. (as he then was) in Bell & Co. Ltd. v. Waman Hemraj [Bell & Co. Ltd. v. Waman Hemraj, 1937 SCC OnLine Bom 99 : (1938) 40 Bom LR 125 : AIR 1938 Bom 223] , where the learned Chief Justice, dealing with Section 25 of the Provincial Small Cause Courts Act, observed: (SCC OnLine Bom paras 3-4)

"3. ... The object of Section 25 is to enable the High Court to see that there has been no miscarriage of justice, that the decision was given according to law.

4. The section does not enumerate the cases in which the Court may interfere in revision, as does, Section 115 of the Code of Civil Procedure, and I certainly do not propose to attempt an exhaustive definition of the circumstances which may justify such interference; but instances which readily occur to the mind are cases in which the Court which made the order had no jurisdiction, or in which the Court has based its decision on evidence which

should not have been admitted, or cases where the unsuccessful party has not been given a proper opportunity of being heard, or the burden of proof has been placed on the wrong shoulders. Wherever the Court comes to the conclusion that the unsuccessful party has not had a proper trial according to law, then the Court can interfere. But, in my opinion, the Court ought not to interfere merely because it thinks that possibly the Judge who heard the case may have arrived at a conclusion which the High Court would not have arrived at.'

This observation has our full concurrence.

10. What the learned Chief Justice has said applies to Section 35 of the Act, with which we are concerned. Judged from this point of view, the learned Single Judge was not justified in interfering with a plain finding of fact and more so, because he himself proceeded on a wrong assumption."

16. Another judgment which needs to be noted is judgment of this Court in Mundri Lal v. Sushila Rani [Mundri Lal v. Sushila Rani, (2007) 8 SCC 609] . This Court held that jurisdiction under Section 25 of the 1887 Act, is wider than the revisional jurisdiction under Section 115 CPC. But pure finding of fact based on appreciation of evidence may not be interfered with, in exercise of jurisdiction under Section 25 of the 1887 Act. The Court also explained the circumstances under which, findings can be interfered with in exercise of jurisdiction under Section 25. There are very limited grounds on which there can be interference in exercise of jurisdiction under Section 25; they are, when (i) findings are perverse or (ii) based on no material or (iii) findings have been arrived at upon taking into consideration the inadmissible evidence or (iv) findings have been arrived at without consideration of relevant evidence.

28. Thus, from the above, it would be clear that there are limited grounds upon which the Court in exercise of powers under Section 25 of the Provincial Small Cause Court Act can interfere. In light of the powers conferred and its scope as noticed above, this Court embarks upon the exercise to test the veracity of the submissions of the learned counsel for the parties.

29. The learned counsel for the revisionist has primarily urged that the SCC Court did not possess jurisdiction to entertain the suit as from the averments made in the plaint, the plaintiffs had described the defendant-revisionist as an un-authorized occupant and thus the suit was not maintainable before a Small Cause Court Act. The other limb of submission relating to jurisdiction is that since no relationship of landlord and tenant was made out and even from the averments in the plaint, it indicated that the rent which was paid by the defendant-revisionist was accepted by the plaintiffs-respondents to be rent on behalf of Smt. Garima Pandey, thus, there was no relationship of landlord and tenant between the plaintiff and the defendant and even otherwise merely by the plaintiffs stating that they had accepted the defendant as a tenant neither it would give rise to the creation of a tenancy nor mere acceptance of rent would create the relationship of landlord and tenant and that being so the Court did not possess the jurisdiction, hence, the judgment of the Trial Court cannot be sustained.

30. The aforesaid submission may sound attractive but upon considertion of the material available on record as well as the pleadings, the same does not impress this Court.

31. It is no doubt true that the jurisdiction of the Court is ascertained by the allegations and averments made in the plaint alone and it is not the defence which is to be looked into for the aforesaid purpose.The decision relied upon by the learned counsel for the revisionist in the cases Sanvarmal Kejriwal (supra) and Mani Nariman Daruwala (Supra) clearly upholds the aforesaid proposition and there is no doubt or quarell to the said proposition. However, in the present facts and circumstances, it is equally true that the plaint has to be considered as a whole and not in piecemeal. The plaintiffs in paragraph 6 while narrating the facts has clearly indicated that though the defendant had filed a frivilous suit but as there was no express or written contract pertaining to the creation of relationship of landlord and tenant and also for the reason that the defendant had issued cheques towards payment of rent which was encashed by the plaintiffs, hence, to remove any doubt, the plaintiffs admit the defendant as their tenant.

32. The plaintiffs had also issued a notice terminating the tenancy to the defendant dated 19.08.2014 wherein the similar averments have been made. The aforesaid notice also indicated that the premises was not governed by the U.P. Act No. 13 of 1972. Thus, it cannot be said that the plaint as a whole does not contain averments regarding the tenancy in question.

33. Apparently, in light of the pleadings delivered by the plaintiffs-respondents, it appears that the plaintiffs-respondents have clearly indicated that the defendant is the tenant who had been paying rent to the plaintiffs which has been accepted by the plaintiff. A notice terminating the tenancy of the defendant was issued and received by him and thereafter the suit was instituted before the Judge, Small Causes. At this juncture, it will be equally important to notice that the averments made in the plaint have to be taken as the way they are. The truth or falsity of its content is to be determined at trial. Thus, in so far as the jurisdiction is concerned, it cannot be said that the suit was incorrectly instituted before the Judge, Small Causes.

34. Coming to the submission that the plaintiffs at some place in the plaint had mentioned that the tenancy was initially in favour of Garima Pandey who had inducted the defendant in an unauthorized fashion and thus the defendant being an un-authorized occupant, the suit would not lie or that there was no relationship of landlord and tenant and even though mere rent was accepted will not create the tenancy. The record indicates that it was the defendant-revisionist who had first instituted a suit for permanent injunction before the Court of Civil Jude, Junior Division, Hawali, Lucknow bearing R.S. No. 177 of 2013 against the present plaintiffs-respondents. A copy of the said plaint has been brought on record and in the said suit it has been averred by the revisionist himself that he is the tenant of Dr. Sangeeta Agarwal on a monthly rent of Rs. 1,600/- + Rs. 100/- towards water charges of one room situate on the ground floor. It is further alleged by the revisionist in the regular suit that his brother and father are also separate tenants of some other portion in the same house. Since they were not paying the rent in time to the landlord which had created difficulty, hence, the present revisionist paid the rent not only on his

behalf but also on behalf of his brother and father.

35. Be that as it may, this aspect has been considered by the Trial Court in detail and while noticing so it has taken note of the respective pleadings and also noticed the fact that the plaintiffs-respondents had appeared in the witness box and duly proved the averments of the plaint. The Trial Court also noticed that the defendant had admitted the tenancy, however, disputed that the rate of rent as well as the extent of the accodomodation under his tenancy, however, he did not appear in the witness box nor examined any witness to prove his defence. In absence of the aforesaid at best, the averments in the written statement remained a plea which could not be substantiated. Hence, treating the admission in so far as the relationship is concerned as well as the absence of the material to the contrary, the trial court recorded a finding that the relationship of landlord and tenant existed between the parties.

36. Thus, once a finding of fact has been recorded by the Trial Court based on the material available on record, this Court is not inclined to distrurb such a finding of fact especially in absence of any cogent material, contrary to the aforesaid, on record.

37. The submission of the learned counsel for the revisionist is an attempt to dig and corrode the pleadings of the plaintiffs to make out a case whereas it failed to lead any evidence nor could give any explanation as to the fact that once the defendant had admitted the tenancy and also admitted that he was paying rent to the landlord in the written statement of the regular suit but had disputed the amount of rent and the extent of accommodation only but failed to lead any evidence to substantiate the same, hence, in view of the aforesaid discussion the first limb of the argument of the revisionist fails.

38. In so far as the submission that mere payment of rent would not create a tenancy and the reliance placed onthe case of M/s Technician Studio Pvt. Ltd. (supra) is concerned, it would indicate that the facts of the aforesaid case were quite different. In the case of M/s Technician Studio Pvt. Ltd. (supra) the payment was made in part performance of the contract of lease contained in a compromise petition. The Apex Court held that payment of rent did not create any tenancy was in the backdrop of the terms and conditions of a contract of lease contained in a compromise petition. Since there was a specific contract in terms whereof the amount was paid in part performance the observations were made by the Apex Court. In the aforesaid judgment, it has further been noticed that whether the relationship of landlord and tenant exists between the parties depends on whether the parties intented to create a tenancy and the intention has to be gathered from the facts and circumstances of the case.

39. Applying the aforesaid proposition, it would indicate that in the present case, the revisionist had instituted the suit first in point of time and admitted himself to be a tenant. The plaintiffs-respondents while filing the SCC Suit referred to the background of facts and specifically stated that they admit the defendant to be the tenant and also that they had accepted the rent from him, accordingly, the intention as well as admission as contained in the pleadings

clearly indicates the creation of relationship of landlord and tenant and that the amount paid by the revisionist would be the rent in respect of the premises in question.

40. In the case of Harshwardhan Chaukani (supra) the Apex Court has noticed the aforesaid and has held that merely by paying the rent a person does not become a tenant but what it further holds is, that it is not the only determinative factor, other circumstances also can be taken into consideration.

41. Taking the overall facts as noticed above, the evidence led by the plaintiffs and no evidence led by the defendant to prove his defence does not persuade this Court to take a different view than the one taken by Trial Court.

42. For the aforesaid reasons, the decisions cited by the learned counsel for the revisionist does not come to his rescue. What this Court finds that since there is no document to establish the lease, however, the conduct of the parties and the evidence on record clearly suggest the relationship of landlord and tenant between the parties and this finding has been recorded by the Trial Court does not suffer from any error. Thus the second submission of the revisionist also fails.

43. In so far as the submission regarding non-grant of opportunity is concerned, upon perusal of the record, this Court finds that the aforesaid submission is also misconceived, inasmuch as, the defendant was granted ample opportunity but he chose not to lead any evidence. The record also reflects that the defendant has been trying to procastanate the litigation by moving multiple applications which all came to be rejected for cogent and appropriate reasons, though, that is not under challenge before this Court but nevertheless since the submission has been raised by the learned counsel for the revisionist, accordingly, it is being noticed by this Court.

44. The submission of the revisionist is that certain document were taken on record against which he was not granted an opportunity to lead any oral evidence also pales into insignificance, inasmuch as, the findings of the Trial Court are not based on the said documents. The same has not been noticed nor the plaintiff led any evidence on the same. In view of the aforesaid, neither the said documents which were not proved by the plaintiffs himself has any relevance nor any prejudice has been caused to the defendant nor the same has been made the basis of the impugned judgment, consequently, the said submission also fails.

45. In light of the aforesaid discussion, this Court is of the firm opinion that the judgment and decree dated 11.11.2019 passed in SCC Suit No. 213 of 2014 by Special Judge, P.C. Act, Court No. 5, Lucknow acting as Judge, Small Causes does not suffer from any error, accordingly, the same is affirmed.

46. The revision is devoid of merits and is dismissed.

47. In the facts and circumstances, there shall be no order as to costs. Office is directed to remit the record of the Trial Court to the court concerned within 10 days.

(2021)06ILR A531
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.06.2021

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Crl. Misc. Bail Application No. 16769 of 2021

Amir @ Bhola ...Applicant
Versus
State of U.P. ...Opp. Party

Counsel for the Applicant:
Sri Manoj Kumar Srivastava, Sri Anwar Hussain, Sri Rajesh Kumar

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

(a) Bail - In view of the nature of evidence, the period of detention already undergone, the unlikelihood of early conclusion of trial and also the absence of any convincing material to indicate the possibility of tampering with the evidence, the applicant may be enlarged on bail. (Para 8)

Application Allowed. (E-8)

List of Cases cited:-

1. Dataram Singh Vs St. of U.P. & anr. (2018) 3 SCC 22

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

1. The Court has convened through Video conferencing.

2. Heard learned counsel for the applicant as well as learned A.G.A. appearing for the State and perused the record.

3. This application has been filed seeking the release of the applicant on bail in Case Crime No. 0047 of 2021, u/s 8/20 of N.D.P.S. Act, 1985 (State of U.P. Vs. Amir @ Bhola), P.S.- Rasoolpur, District Firozabad.

4. Submission of learned counsel for the applicant is that the quantity of the contraband shown to be recovered from the possession of the applicant is 950 gram Charas which is said to be below commercial quantity. The contention is that the police has deliberately shown the amount exaggeratedly just in order to add to the gravity of the offence. It has also been pointed out that the applicant is jail since 24.02.2021. Other submissions assailing the the truthfulness of the prosecution story with regard to the recovery have also been made. Further contention is that the statutory provisions of the Narcotic Drugs and Psychotropic Substances Act, 1985 have not been complied with in true letter and spirit, and therefore, the legal sanctity of the alleged recovery stands vitiated. The counsel has also tried to demonstrate the circumstances indicating the false implication of the applicant. Malice behind the prosecution has also been pleaded during the course of the arguments placed on behalf of the accused.

5. Several other submissions in order to demonstrate the falsity of the allegations made against the applicant 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 applicant 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 the accused is not having any criminal history and he is in jail since 24.02.2021 and that in the wake of heavy pendency of cases in the Court, there is no likelihood of any early conclusion of trial.

6. Learned A.G.A. opposed the prayer for bail.

7. 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 the absence of any convincing material to indicate the possibility of tampering with the evidence and larger mandate of the Article 21 of the Constitution of India and the law laid down by the Hon'ble Apex Court in the case of **Dataram Singh vs. State of UP and another, (2018) 3 SCC 22**, this Court is of the view that the applicant may be enlarged on bail.

8. Let the applicant- **Amir @ Bhola** involved in Case Crime No. 0047 of 2021, u/s 8/20 of N.D.P.S. Act, 1985 (State of U.P. Vs. Amir @ Bhola), P.S.- Rasoolpur, District Firozabad, be released on bail on his executing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned on the following conditions :-

(1) The applicant will not make any attempt to tamper with the prosecution evidence in any manner whatsoever.

(2) The applicant will personally appear on each and every date fixed in the court below and his personal presence shall not be exempted unless the court itself deems it fit to do so in the interest of justice.

(3) The applicant shall cooperate in the trial sincerely without seeking any adjournment.

(4) The applicant shall not indulge in any criminal activity or commission of any crime after being released on bail.

(5) The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad or certified copy issued from the Registry of the High Court, Allahabad.

(6) 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. It may be observed that in the event of any breach of the aforesaid conditions, the court below shall be at liberty to proceed for the cancellation of applicant's bail.

10. It is clarified that the observations, if any, made in this order are strictly confined to the disposal of the bail application and must not be construed to have any reflection on the ultimate merits of the case.

(2021)06ILR A532
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.01.2021

BEFORE

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

Writ-A No. 43109 of 2015

Gulab Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:

Sri S.P. Sharma, Sri Ajay Kumar Srivastava, Sri Samir Sharma

Counsel for the Respondents:
C.S.C., Sri M.P. Rai, Sri Sudhir Dixit, Sri U.S. Singh Visen

A. Service Matter - U.P. Road Transport Corporation Employees (other than Officers) Service Regulations (1981) – Regn. 61, 62, 63 - disciplinary proceedings against a retired employee - there is no jurisdiction with the Corporation to proceed in disciplinary proceedings against an employee, who retires pending such proceedings (Para 12)

Disciplinary proceedings commenced on 14.03.2014 - Pending disciplinary proceedings, petitioner retired, on attaining the age of superannuation, on 31.08.2014 - *Held* - order dated 29.11.2014 passed by the Regional Manager punishing the petitioner in disciplinary proceedings is without jurisdiction and a nullity, as it was passed after the petitioner's retirement (Para 12)

B. Natural justice - Violation of principle of natural justice - without affording any opportunity of hearing to petitioner, selection grades & ACP benefits paid to the petitioner were modified & direction for recovery of the excess payments was made - *Held* - any order that visits a person with adverse civil consequences, ought to be preceded by opportunity - It is not the stigma of punishment, but the adversity of consequences to an individual, that attracts the obligation of a State or of its instrumentalities, to hear a person likely to be affected before decision - Court rejected Corporation argument that the order being not one of punishment, but about the rectification of a mistake in the determination of the petitioner's emoluments, so opportunity of hearing not required (Para 13)

C. Service Matter - U.P. Road Transport Corporation Employees (other than Officers) Service Regulations (1981) - recovery of the sum of money paid in excess - petitioner a Class III/Group C employee, and at the same time, a retired employee of the Corporation - petitioner's case falls under the first and the second classes of cases adumbrated in Rafiq Masih case where recovery of emoluments paid in excess, has not been favoured (Para 16)

Allowed. (E-4)

List of Cases cited:

1. Rajendra Prasad Singh Vs St. of U.P. & ors. Writ - A No. - 7517 of 2016 dt 29.02.2016

2. Dev Prakash Tiwari Vs UP Cooperative Institutional Service Board, Lucknow & ors. (2014) 7 SCC 260

3. Banda District Cooperative Bank Ltd. & ors. Vs St.of U.P. & ors. Special Appeal Defective No. 31 of 2016, Dt 03.02.2016

4. St. of Pun. & ors. Vs Rafiq Masih (White Washer) & ors. (2015) 4 SCC 334

5. S.N. Mukherjee Vs U.O.I. (1990) 4 SCC 594

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

1. The petitioner commenced his career's journey as a Conductor with the Uttar Pradesh State Road Transport Corporation1. He was promoted to the post of a Booking Clerk. He had a smooth ride for the most part of his career until the fag end of it. The petitioner served the Corporation from 01.12.1981 to 31.08.2014. While in service, the petitioner was granted the first selection grade with effect from 01.12.1991, on completion of 10 years continuous satisfactory service. His pay-scale was revised accordingly. The petitioner was granted a second selection grade with effect from 01.12.2001, on completion of 20 years continuous satisfactory service, with a corresponding revision of his pay. Again on 19.02.2013, by means of an order of that date, the

petitioner was granted benefit of the third Assured Career Progression2. He was granted grade-pay of Rs. 4200/- with effect from 01.12.2001. Upon grant of this ACP, the petitioner's emoluments were revised and he was also paid arrears.

2. Trouble for the petitioner began on 14.03.2014, when he was issued with a charge sheet. It appears that at the relevant time, the petitioner was deputed to do the work of Issue Clerk in the Checking Department at the Aligarh Establishment of the Corporation. It was his duty to deposit receipts of the Corporation in the Corporation Treasury on a single queue bus service received on a daily basis. The petitioner, however, was charged with depositing the receipts of the Corporation accumulated over a number of days, instead of doing it daily. This was *prima facie* found to be a violation of the rules of the Corporation, besides an act of negligence. The petitioner was charged, as already said, on 14.03.2014, with violation of Rule 61 and 62 of the Uttar Pradesh State Road Transport Corporation Employees (Other Than Officers) Service Regulations, 19813.

3. The petitioner submitted a reply to the charge sheet, denying all the charges against him. Pending disciplinary proceedings, the petitioner retired, on attaining the age of superannuation, on 31.08.2014. The departmental inquiry that had been initiated against the petitioner went ahead and an inquiry report was submitted on 13.11.2014, according to which, the petitioner was found negligent in the performance of his duties. It was one of the petitioner's defences that he did not make the delay in deposit of receipts, received bag-wise, of his own. It was done that way on account of directions in this regard, received from the then Assistant Regional Manager, on 31.12.2011 and 18.01.2012. The said Officer of the Corporation had instructed that when the load factor was low, bag-wise deposit be not made and the conductor concerned be required to speak to him. It was further directed that bag-wise deposit of receipts be made only in the event the load factor was 75%. It was explained that the delay in depositing the receipts was on account of these instructions and there was no culpability on the petitioner's part.

4. The Assistant Regional Manager, who held inquiry into the charges, submitted an inquiry report dated 13.11.2014, holding the charges proved, and the petitioner guilty of negligence in the performance of his duties. The Regional Manager of the Corporation at Aligarh, without issuing a show-cause notice, passed an order dated 29.11.2014, holding the petitioner guilty of negligence. He imposed a punishment of recovery of a sum of Rs. 8,000/- from the petitioner, with a warning for the future. This order is one of the orders under challenge, the challenge being introduced through amendment. By an order dated 22.12.2014, the petitioner's gratuity was calculated by the Corporation, determining it at a total sum of Rs. 6,39,178/-; but the sum of Rs. 8000/- ordered to be recovered from the petitioner was deducted from his gratuity. The order dated 22.12.2014, calculating the petitioner's gratuity to the extent that it deducts a sum of Rs. 8000/- from the sum payable, is also under challenge.

5. Mr. Samir Sharma, learned Senior Advocate assisted by Mr. Ajay Kumar Srivastava, learned counsel for the petitioner, submits that the impugned orders dated 29.11.2014 and 22.12.2014 represent one part of the petitioner's

grievance, that has two facets to it. The first of the two orders is an order awarding him punishment in departmental proceedings illegally, and the other order deducts the sum of Rs. 8000/- illegally from the petitioner's gratuity, which, according to Mr. Sharma, notwithstanding the validity of the order of punishment, could not be deducted from whatever money was payable in gratuity to the petitioner. As it appears, this was not the end of troubles for the petitioner. By means of an order dated 20.06.2015, without affording any opportunity of hearing to the petitioner, the first and the second selection grades and the third ACP benefits paid to the petitioner were modified, directing recovery of the excess payments made. By this order of 20th June, 2015 the first selection grade was awarded to the petitioner with effect from 01.12.1993, instead of 01.12.1991, and the second selection grade with effect from 01.12.2007, instead of 01.12.2001. All payments made in accordance with the earlier date of award of the two selection grades and the consequential third ACP were directed to be recovered, as already said. Thereafter, by an order dated 08.07.2015, close on heels of the order dated 20.06.2015, the petitioner's emoluments were revised and re-fixed, directing recovery of the sum of money paid in excess, going by the revised calculation with effect from 01.12.1993. The orders dated 20.06.2015 and 08.07.2015 are also under challenge in the present writ petition. This downward revision of emoluments for the petitioner also led to redetermination of gratuity payable to him. This was done by means of an order dated 10.07.2015. Instead of the gratuity originally determined and paid to the petitioner in the sum of Rs. 6,39,179/-, it was redetermined at a figure of Rs. 6,31,696/-. Thus, a sum of Rs. 7,482/- was found to be paid in excess to the petitioner, under the head of gratuity, in terms of his redetermined emoluments. This was worked out by the order dated 10.07.2015, passed again by the Assistant Regional Manager, directing recovery of a sum of Rs. 7,482/- from the petitioner, under the head of gratuity paid in excess.

6. It is the petitioner's case and apparently not in dispute that though the gratuity was determined prior to a redetermination of the petitioner's emoluments at a figure of Rs. 6,39,179/-, the entire amount was not paid to the petitioner. It appears that a sum of Rs. 2,92,505/- had been withheld by the respondents under the head of leave encashment. The petitioner approached this Court, by means of *Writ - A No. 24726 of 2016*, with a case that a sum of Rs. 2,92,565/- on account of gratuity had not been released. This Court, by an order dated 25.05.2016, summarily disposed of the petition, with a direction to the Regional Manager of the Corporation to examine the petitioner's claims, noticed in this Court's order dated 25.05.2016, passed in *Writ - A No. 24726 of 2016*, and to decide the same by means of a reasoned and speaking order, within a period of three months from the date of presentation of a certified copy of that order. In compliance with the order dated 25.05.2016 passed in *Writ - A No. 24726 of 2016*, the Regional Manager, Corporation at Aligarh, considered the petitioner's representation dated 02.06.2016, where he did a cursory reappraisal of the order dated 20.06.2015, whereby the petitioner's emoluments were redetermined. He approved of that order. It appears also from the order dated 27.08.2016 that, what was withheld in the sum of Rs. 2,96,656/- was not on account of unpaid gratuity; it was due under the

head of leave encashment. In order to set the record straight, it must be mentioned that the fact that a sum of Rs. 2,96,565/- was withheld by the respondents from the gratuity dues of the petitioner, appears to be an erroneous mention, because the matter was summarily disposed of on the basis of whatever the petitioner said; and, being all that was before the Court.

7. A reading of the order dated 27.08.2016, it must be remarked here, shows that dues of the petitioner that were withheld, was a sum of money greater than Rs. 2,96,565/-. This difference in the petitioner's entitlement had come about as a result of the direction to redetermine his emoluments made on the basis of orders dated 20.06.2015 and 08.07.2015, both passed by the Regional Manager of the Corporation at Aligarh. It transpires that the Regional Manager of the Corporation has proceeded to hold that Rs. 3,45,633/- is all that has been determined towards excess emoluments paid to the petitioner, on account of a premature grant of the first and the second selection grade as well as the third ACP. He has directed recovery of the sum of money of Rs. 3,45,633/- in the manner that it is to be set-off against the petitioner's entitlement to leave encashment in the sum of Rs. 2,92,565/-, and a sum of Rs. 11,568/- on account of arrears of the Dearness Allowance, leaving a residue of Rs. 41,500/-, which has to be recovered in accordance with law. Challenge to the order dated 27.08.2016 has also been brought in through amendment. Thus, there are six orders under challenge in the present writ petition, to wit : the orders dated 29.11.2014 and 22.12.2014, both passed by the Regional Manager and the Assistant Manager, Corporation at Aligarh, respectively, punishing the petitioner post retirement, in disciplinary proceedings; and orders dated 20.06.2015, 10.07.2015, 08.07.2015 and 27.08.2016, all in substance, revising downwards the petitioner's emoluments, already determined, and directing recovery.

8. The parties, having exchanged affidavits when this matter came up on 10.12.2020, it was admitted to hearing, and heard there and then. Judgment was reserved.

9. Heard Mr. Samir Sharma, learned Senior Advocate assisted by Mr. Ajay Kumar Srivastava, learned counsel for the petitioner, Mr. U.S. Singh Visen, learned counsel appearing on behalf of respondent nos. 2 and 3, and the learned Standing Counsel appearing on behalf of respondent no. 1.

10. Now, so far as the order dated 29.11.2014 passed by the Regional Manager of the Corporation at Aligarh, punishing the petitioner in disciplinary proceedings with the imposition of a penalty of Rs. 8,000/- recoverable from his emoluments, along with a warning to be careful in future is concerned, Mr. Sharma submits that the said order is absolutely without jurisdiction. It is the learned Senior Counsel's contention that disciplinary proceedings in this case commenced on 14.03.2014, with the issue of a charge-sheet to the petitioner. The petitioner filed a reply to the charge-sheet, denying the charges. Pending disciplinary proceedings, he retired on 31.08.2014, upon attaining the age of superannuation. Notwithstanding the petitioner's retirement, the departmental inquiry was conducted and a report submitted, holding the petitioner guilty of negligence in the performance of his duties. It is pointed out that the Disciplinary Authority, the Regional Manager of the

Corporation at Aligarh, without issuing a show-cause notice, proceeded to punish the petitioner, by means of the impugned order, in the manner *hereinabove* indicated. It is argued by Mr. Samir Sharma, learned Senior Advocate, that there is no provision under the Regulations of 1981 to initiate or continue disciplinary proceedings against a retired employee of the Corporation. He urges that the order of punishment dated 29.10.2014, and the consequential recovery, directed to be made from the petitioner's gratuity *vide* order dated 22.12.2014, are without jurisdiction and manifestly illegal. The stand of the Corporation *vis-a-vis* the impugned order dated 29.10.2014 is carried in their counter affidavit filed in opposition to the amended pleas. It is a counter affidavit filed by one R.S. Pandey, the Assistant Regional Manager, Uttar Pradesh State Road Transport Corporation, Leader Road, Allahabad. It is an affidavit dated 08.12.2020. The stand of the Corporation is most startling. Paragraph no. 5 of the counter affidavit under reference, in answer to the amended Paragraph no. 13 of the writ petition (described in the counter affidavit as Para 3 (13)) says that no departmental proceedings were ever initiated against the petitioner, or conducted. It is stated that the order dated 08.07.2015 was passed because the petitioner had been wrongfully placed in a higher pay scale. It does not mention at all anything about the order dated 29.10.2014, specifically. But, the stand of the Corporation is very clear that no departmental proceedings were ever initiated against the petitioner. Paragraph no. 5 of the counter affidavit under reference, filed on behalf of the Corporation, reads :

5. That the contents of paragraph no.3 (13) of the Affidavit filed in support of Amendment Application are false and appear to be misconceived hence denied. In reply thereto **it is submitted that no departmental enquiry was ever initiated or conducted against the petitioner and the order dated 08.07.2015 was passed because the higher pay** scale Rs. 1175-259-1625 was granted to the petitioner on 01.12.1991 instead of 1175-25-1625 hence the order dated 08.07.2015 was infact a correction order and not the punishment hence the amendments made in para 3(13) is meaningless and is not covered by the Ruling sited in the paragraph. **(emphasis by Court)**

11. Now, if that stand of the Corporation were to be believed, the petitioner never faced any disciplinary proceedings. This Court has described that stand of the Corporation as startling, because a perusal of the order dated 29.10.2014, passed by the Regional Manager of the Corporation at Aligarh shows fair and square that it is an order of punishment passed in disciplinary proceedings against the petitioner. There could never be any doubt about the fact that it is so. The fact that a State Corporation like the U.P. State Road Transport Corporation should take a stand like the one in Para 5 of the counter affidavit filed in response to the amended pleas is, to say the least, most shocking. The said affidavit has been filed by an Officer of the rank of an Assistant Regional Manager. This Court cannot go by the Corporation's stand that they never passed the order of punishment dated 29.11.2014, or ever initiated disciplinary proceedings against the petitioner. This Court has no option but to ignore the Corporation's stand taken in counter affidavit filed in answer to the amended pleas, so far as the validity of the order dated 29.11.2014 is concerned. This

virtually leaves the assertion of the petitioner about the impugned order dated 29.11.2014 being without jurisdiction and a nullity, as it was passed by the Corporation after the petitioner's retirement, unrebutted. This Court can safely take it to be unrebutted that disciplinary proceedings commenced against the petitioner on 14.03.2014, when the petitioner was still in service, but concluded on 29.11.2014, after he had retired from the Corporation's service on 31.08.2014, upon attaining the age of superannuation. However, the petitioner's stand in law cannot be accepted merely for the respondents failure to plead that upon the petitioner's retirement, the Corporation lost all jurisdiction to punish him. This Court has examined the Regulations which govern the petitioner's service conditions. There is nothing apparent or brought to the Court's notice, which may show that after retirement, the employers have a continuing disciplinary jurisdiction over their retired employee. For a legal proposition, retirement upon superannuation is one of the modes by which the relationship of an employer and employee comes to a terminus. Post-retirement, the relationship of an employer and employee, or master and servant, ceases. That relationship is a *sine qua non* for the exercise of disciplinary jurisdiction by the employers. However, where the tenure of an employee is governed by Statute or statutory service rules or regulations, provision may be made, extending the disciplinary jurisdiction of the employers beyond an employee's retirement, particularly so, where proceedings have commenced prior to retirement. But, in this case, nothing in the Regulations point to a power of that kind with the Corporation over their ex-employees, who have superannuated and retired from service. This question engaged the attention of a learned Single Judge of this Court in **Rajendra Prasad Singh v. State of U.P. and 4 Others**4. Incidentally, in **Rajendra Pratap Singh** *(supra)*, a decision towards which Mr. Sameer Sharma drew this Court's attention, it was held by this Court, in the context of the regulations, following a decision of the Supreme Court in **Dev Prakash Tiwari v. Uttar Pradesh Cooperative Institutional Service Board, Lucknow and others**5 and the decision of a Division Bench of this Court in **Banda District Cooperative Bank Limited and 2 Others v. State of U.P. and 2 Others**6, thus :

On a pointed query of the Court, the learned counsel for the appellant candidly admitted that there was no provision under the U.P. Cooperative Service Regulation 1975, which may authorize continuance of the proceedings from the stage at which the defect has been noticed nor is there any provision in terms of which the proceedings may be continued and taken to their logical conclusion even after the retirement of the petitioner. We may in this connection refer to the law as laid down by the Supreme Court in Bhagirathi Jena Vs. Board of Directors, O.S.F.C. & others4 as reiterated by the Supreme Court in Deo Prakash Tewari Vs. U.P. Cooperative Institutional Service Board which clearly hold that once an employee has retired from service, in the absence of any authority vesting in the employer the right to continue disciplinary proceedings thereafter, the enquiry proceedings would be deemed to have lapsed and the employee would be entitled to all retiral benefits. In light of the above law laid down by the Supreme Court, we are unable to accede to the submission of the learned counsel for the appellant for a remit of the proceedings.

For the aforesaid reasons, we find no ground warranting interference with the judgment of the learned Single Judge. The special appeal is consequently dismissed.

12. Now, the decision in **Rajendra Prasad Singh** was concerned with the respondent-Corporation and the Regulations on the same issue of law as the one that arises here. It was held on the terms of the Regulations, going by principles that had endorsement of authority, that in the absence of provisions in the service rules that enabled disciplinary proceedings to continue beyond superannuation, disciplinary proceedings would be without jurisdiction. In **Rajendra Prasad Singh**, the Corporation had conceded to the aforesaid position of law. Here, they have not at all pleaded to it. Rather, they have pleaded absurdly on facts to show that no order of punishment was ever passed against the petitioner, or disciplinary proceedings initiated against him. This Court has, for itself, as already stated, examined the Regulations, and is of opinion that there is no jurisdiction with the Corporation to proceed in disciplinary proceedings against an employee, who retires pending such proceedings, in the absence of provisions enabling them in this behalf. Those provisions are not there. As such, the order dated 29.11.2014 passed by the Regional Manager of the Corporation at Aligarh, directing recovery dated 22.12.2014, is absolutely without jurisdiction, and liable to be quashed. The question whether recovery can be made from the petitioners' gratuity need not be answered here, as the orders that gave rise to the issue have been found to be vitiated by this Court. This takes the Court to the validity of another group of orders, the net effect of which is to bring about a prejudicial or downward revision of petitioner's emoluments, by postponing grant for the first selection grade, the second selection grade, and the third ACP, as already indicated. The substantive order, by which the petitioner's emoluments were directed to be revised downwards, is the order dated 20.06.2015. This order was again passed by the Regional Manager of the Corporation at Aligarh. The other orders under challenge, that seek to effect recovery of emoluments paid in excess, that is to say, the orders dated 10.07.2015 and 08.07.2015, are all consequential orders. It is submitted by Mr. Sameer Sharma, learned Senior Counsel for the petitioner, that the order dated 20.06.2015 has been passed without opportunity of hearing to the petitioner, and behind his back. It is his case that the order aforesaid, being one adversely affecting the petitioner's rights, could not be made, without affording him reasonable opportunity of showing cause. It is particularly submitted by Mr. Sharma that the petitioner, being a Class-III employee, who had been paid his emoluments as determined by the Corporation, in terms of pay fixation made in his favour from time to time, the principle laid down by the Supreme Court in **State of Punjab & Others v. Rafiq Masih (White Washer) and others**7 would prevent the Corporation from recovering any emoluments paid in excess. So far as the question regarding the provision of opportunity is concerned, Mr. U.S. Singh Visen submits that the order dated 20.06.2015 only involved a correction to the mistaken pay fixation. It did not involve any punishment inflicted on the petitioner. As such, no opportunity of hearing was required. About the right of the employer to recover, which is subject to various exceptions carried in **Rafiq Masih** *(supra)*, Mr. Visen submits that the petitioner being paid in excess of his due

emoluments, there is no equity in his favour that may entitle him to the benefit of the principles laid down in **Rafiq Masih**.

13. This Court has considered the rival submissions. So far as the question of opportunity of hearing is concerned, the principle that any order that visits a person with adverse civil consequences, ought to be preceded by opportunity, is established beyond cavil. It is not the stigma of punishment, but the adversity of consequences to an individual, that attracts the obligation of a State or of its instrumentalities, to hear a person likely to be affected before decision. This principle has particularly been laid down in the case of **S.N. Mukherjee v. Union of India**8. Thus, the submission advanced on behalf of the Corporation that the order dated 20.06.2016, being not one of punishment, but about the rectification of a mistake in the determination of the petitioner's emoluments, cannot be sustained. The aforesaid decision does have the serious civil consequences, adverse to the petitioner by reducing his emoluments. There is, however, one facet of the matter about this issue. The petitioner earlier came up before this Court through *Writ - A No. 24726 of 2016*, raising a grievance about the Corporation, unauthorisedly holding his gratuity in the sum of Rs. 2,96,565/-, for the petitioner thought that what was withheld was part of his gratuity; in fact, it was leave encashment dues, as already stated. This Court disposed of the writ petition, directing the Corporation to examine the petitioner's claim and decide the same by means of a reasoned and speaking order, within a specified period of time. The Regional Manager of the Corporation considered the petitioner's representation dated 02.06.2016, that was submitted to him, along with a copy of the order passed by this Court in *Writ - A No. 24726 of 2016*. While passing the order dated 27.08.2016, rejecting the petitioner's claim, the Regional Manager, in one sense, did hear the petitioner *vis-à-vis* the substantive order dated 20.06.2015, whereby his emoluments suffered a downward revision. A perusal of the said order shows that the petitioner was granted the first and the second selection grade and consequently, the third ACP, not because he had not put in a requisite number of years in service, but because he had to his credit, three orders dated 17.09.1986, 30.04.1996 and 24.11.1997, by which his annual increments for specified periods of time were stopped. These orders, which appear to be punishment orders, and regarding which there is no pleading before this Court, were not taken into account, when the first and the second selection grade was granted to the petitioner. In the opinion of this Court, denial of opportunity would still be there, because the petitioner was not specifically confronted with the question that he had been granted the first and the second selection grade in error, ignoring the three increment stoppage order of limited duration passed against him. Till this adverse material was brought to the petitioner's notice, the order dated 27.08.2016 is a hollow reiteration of the order dated 15.06.2020, with no meaningful opportunity extended to the petitioner. The vice of denial of opportunity, therefore, continues to vitiate the order dated 27.08.2016, as much as it does the order dated 20.06.2015. Quite apart, this Court is of opinion that to revise a Class-III employee's emoluments downwards and prejudicial to him after retirement, on ground that at the time when he was awarded a particular selection grade, some minor punishment order/orders that disentitled him were not noticed,

would be inequitable. It is here that the other limb of Mr. Sharma's submissions also becomes relevant, where it is urged that the employers in this case ought not to recover from the petitioner, a retired Class-III employee, on the principles laid down in **Rafiq Masih**.

14. In **Rafiq Masih**, the principles on which the right of the employer to recover depends, were laid down in the following words by their Lordships of the Supreme Court :

7. Having examined a number of judgments rendered by this Court, we are of the view, that orders passed by the employer seeking recovery of monetary benefits wrongly extended to the employees, can only be interfered with, in cases where such recovery would result in a hardship of a nature, which would far outweigh, the equitable balance of the employer's right to recover. In other words, interference would be called for, only in such cases where, it would be iniquitous to recover the payment made. In order to ascertain the parameters of the above consideration, and the test to be applied, reference needs to be made to situations when this Court exempted employees from such recovery, even in exercise of its jurisdiction under Article 142 of the Constitution of India. Repeated exercise of such power, "for doing complete justice in any cause" would establish that the recovery being effected was iniquitous, and therefore, arbitrary. And accordingly, the interference at the hands of this Court.

8. As between two parties, if a determination is rendered in favour of the party, which is the weaker of the two, without any serious detriment to the other (which is truly a welfare State), the issue resolved would be in consonance with the concept of justice, which is assured to the citizens of India, even in the Preamble of the Constitution of India. The right to recover being pursued by the employer, will have to be compared, with the effect of the recovery on the employee concerned. If the effect of the recovery from the employee concerned would be, more unfair, more wrongful, more improper, and more unwarranted, than the corresponding right of the employer to recover the amount, then it would be iniquitous and arbitrary, to effect the recovery. In such a situation, the employee's right would outbalance, and therefore eclipse, the right of the employer to recover.

9. The doctrine of equality is a dynamic and evolving concept having many dimensions. The embodiment of the doctrine of equality can be found in Articles 14 to 18 contained in Part III of the Constitution of India, dealing with "fundamental rights". These articles of the Constitution, besides assuring equality before the law and equal protection of the laws, also disallow discrimination with the object of achieving equality, in matters of employment; abolish untouchability, to upgrade the social status of an ostracised section of the society; and extinguish titles, to scale down the status of a section of the society, with such appellations. The embodiment of the doctrine of equality, can also be found in Articles 38, 39, 39-A, 43 and 46 contained in Part IV of the Constitution of India, dealing with the "directive principles of State policy". These articles of the Constitution of India contain a mandate to the State requiring it to assure a social order providing justice--social, economic and political, by inter alia minimising monetary inequalities, and by securing the right to adequate means of livelihood, and by providing for adequate wages so as to ensure, an appropriate

standard of life, and by promoting economic interests of the weaker sections.

15. After considering various decisions, where the right of the employer to recover had fallen for scrutiny, the following principles were laid down in **Rafiq Masih** :

18. It is not possible to postulate all situations of hardship which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to hereinabove, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:

(i) Recovery from the employees belonging to Class III and Class IV service (or Group C and Group D service).

(ii) Recovery from the retired employees, or the employees who are due to retire within one year, of the order of recovery.

(iii) Recovery from the employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.

(iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.

(v) In any other case, where the court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover.

16. It would appear that recovery from the petitioner ought not to be made, because the petitioner's case falls under the first and the second classes of cases adumbrated in **Rafiq Masih**, where recovery of emoluments paid in excess, has not been favoured. The petitioner is a Class III/Group C employee, and at the same time, a retired employee of the Corporation.

17. The orders dated 20.06.2015 and 27.10.2016 passed by Regional Manager of Corporation at Aligarh, in the opinion of this Court, have not been able to purge themselves of the vice of denial of opportunity. The orders aforesaid would clearly be bad, in the opinion of this Court, on this score. An answer to the question whether orders being found to be bad on ground of denial of opportunity, should respondents be given the logical right to hear the petitioner afresh, confronting him with material on the basis of which he has been subjected to an adverse revision or diminution in his emoluments, would ordinarily be in the employer's favour. But, here is a case where the petitioner is a retired Class-III employee, who is exposed to the peril or a sufferance of a diminution in his emoluments, because the employers have committed a mistake in reading his service records, while granting him the first and the second selection grades. In the opinion of this Court, it would be most inequitable and illogical, at this distance of time, to subject the petitioner to the otherwise logical consequence of a callous mistake made by the employers years ago, when the petitioner was in their employ. This opinion, this Court expresses, on the supposition that if heard, the petitioner would still be subject to a downward revision of his emoluments. It is not known whether it would truly be so. But in any

view of the matter, the equities that arise on the principles settled in **Rafiq Masih**, the employers ought not to be permitted to recover from the petitioner.

18. In the result, this writ petition **succeeds** and is **allowed**. The orders dated 29.11.2014, 22.12.2014, 20.06.2015, 10.07.2015, 08.07.2015 and 27.08.2016, variously passed by the Regional ManZger and the Assistant Regional Manager of the Corporation at Aligarh, are hereby **quashed**. The entire post-retiral benefits of the petitioner, without any diminution to his emoluments, shall be paid to him forthwith.

19. There shall, however, be no order as to costs.

(2021)06ILR A543
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.06.2021

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Crl. Misc. Bail Application No. 16687 of 2021

Shakir Mewati ...Applicant
Versus
State of U.P. ...Opp. Party

Counsel for the Applicant:
Sri Sanjay Ojha, Sri Amar Jeet Upadhyay

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

Criminal Law - Criminal Procedure Code (2 of 1974) – Section 437 - Narcotic Drugs and Psychotropic Substances Act, 1985 - Section 21/20 - Bail - Grant of - 120 gms of Alprazolam, slightly above commercial quantity, recovered from the possession of applicant - argument of applicant that statutory provisions of the Narcotic Drugs and Psychotropic Substances Act, 1985 not complied with, therefore no legal sanctity of the alleged recovery - Bail, granted (Para 4, 7)

Allowed. (E-4)

List of Cases cited:-

1. Dataram Singh Vs St. of U.P. & anr., (2018) 3 SCC 22

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

1. The Court convened through ***video conferencing***.

2. Heard learned counsel for the applicant as well as learned A.G.A. appearing for the State and perused the record.

3. This application has been filed seeking the release of the applicant on bail in Case Crime No. 142 of 2021 under sections 21/20 N.D.P.S. Act, police station Kotwali Nagar, District Bulandshahar.

4. Submission of learned counsel for the applicant is that the quantity of the contraband shown to be recovered from the possession of the applicant is 120 gms. Alprazolam which is said to be slightly more to the above commercial quantity. The contention is that the police has deliberately shown the amount exaggeratedly just in order to add gravity to the offence. It has also been pointed out that the applicant is jail since 06.02.2021. Other submissions assailing the truthfulness of the prosecution story with regard to the recovery have also been made. Further contention is that the statutory provisions of the Narcotic Drugs and Psychotropic Substances Act, 1985 have not been complied with in true letter and spirit, and therefore, the legal sanctity of the alleged recovery stands vitiated. The

counsel has also tried to demonstrate the circumstances indicating the false implication of the applicant. Malice behind the prosecution has also been pleaded during the course of the arguments placed on behalf of the accused.

5. Several other submissions in order to demonstrate the falsity of the allegations made against the applicant 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 applicant 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 the accused is not having any criminal history and he is in jail since 6.2.2021 and that in the wake of heavy pendency of cases in the Court, there is no likelihood of any early conclusion of trial.

6. Learned A.G.A. opposed the prayer for bail.

7. 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 the absence of any convincing material to indicate the possibility of tampering with the evidence and larger mandate of the Article 21 of the Constitution of India and the law laid down by the Hon'ble Apex Court in the case of ***Dataram Singh vs. State of UP and another, (2018) 3 SCC 22***, this Court is of the view that the applicant may be enlarged on bail.

8. Let the applicant- Shakir Mewati involved in Case Crime No. 142 of 2021 under sections 21/20 N.D.P.S. Act, police station Kotwali Nagar, District Bulandshahar be released on bail on his executing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned on the following conditions :-

(1) The applicant will not make any attempt to tamper with the prosecution evidence in any manner whatsoever.

(2) The applicant will personally appear on each and every date fixed in the court below and his personal presence shall not be exempted unless the court itself deems it fit to do so in the interest of justice.

(3) The applicant shall cooperate in the trial sincerely without seeking any adjournment.

(4) The applicant shall not indulge in any criminal activity or commission of any crime after being released on bail.

(5)The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad or certified copy issued from the Registry of the High Court, Allahabad.

(6) 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. It may be observed that in the event of any breach of the aforesaid conditions, the court below shall be at liberty to proceed for the cancellation of applicant's bail.

10. It is clarified that the observations, if any, made in this order are strictly

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

(2021)06ILR A545
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.06.2021

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Crl. Misc. Bail Application No. 16755 of 2021

Radhey Shyam Yadav ...Applicant
Versus
State of U.P. ...Opp. Party

Counsel for the Applicant:
Sri Ankit Agarwal, Sri Gyan Prakash Mishra

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

Criminal Law – Criminal Procedure Code (2 of 1974) – Section 437 - Excise Act,1958 - Section 63 - Indian Penal Code, 1860 - Section 420 - Bail - Grant of - allegation that applicant, a truck driver, was illegally transporting whisky - contention of applicant that he showed all relevant papers to the police but they refused to entertain the same – mandatory provisions of Excise Act were not followed - prosecution case does not go beyond the purview of Excise Act - Bail, granted (Para 4, 7)

Allowed. (E-4)

List of Cases cited:-

1. Dataram Singh Vs St. of U.P. & anr., (2018) 3 SCC 22

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

1. The Court has convened through ***Video Conferencing***.

2. Heard learned counsel for the applicant, learned A.G.A. appearing for the State and perused the record.

3. This application has been filed seeking the release of the applicant on bail in Case Crime No.89 of 2021, under Section 420 I.P.C. and 63 of Excise Act, Police Station Gulaothi, District Bulandshahr.

4. Learned counsel for the applicant submits that as per the prosecution case, on 4.2.2021 the applicant was carrying 1100 boxes of whisky having brand of 'Kims Gold Special Whisky' and each box contained 12 bottles and the said whisky was being illegally transported by the applicant to be delivered at M/s North East Liquors Bhalukkpong, District Kameng, Arunachal Pradesh and in that regard bill memo dated 22.2.2021 for 1200 boxes, issued by the High Field Distillers & Bottlers Pvt. Ltd., Chandigarh bearing TIN/CST No.12020443191 for a total sum of Rs.4,98,000/- and also the relevant papers issued by the liquor Company are annexed as Annexure-3 to the affidavit filed in support of the bail application. All these papers were shown by the applicant, who is driver of the truck in question, to the police officers but they totally refused to entertain the same and without giving any valid reason, falsely implicated the applicant in the present case. He further submits that the applicant is only a driver of the alleged truck in question bearing No.UP50AT 0937 which is registered in the name of one Julmi Yadav and the applicant has no concern with the said 1100 boxes of whisky which were alleged to have been recovered, actually there were 1200 boxes of whisky but the police team has only shown 1100 boxes of whisky to be recovered and 100 boxes of whisky were

illegally removed by the police team. He next argued that the entire allegation made in the F.I.R. is based on ulterior motive and when the applicant did not fulfil the demand of illegal gratification of the police team, he has been falsely implicated in the present case. No offence whatsoever is made out against the applicant. The mandatory provisions of Excise Act were not followed by the informant. The offence does not cover beyond the offence of Excise Act. Thus, the prosecution case does not go beyond the purview of Excise Act.

5. Several other submissions in order to demonstrate the falsity of the allegations made against the applicant 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 applicant 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 the accused is not having any criminal history and he is in jail since 25.2.2021 and that in the wake of heavy pendency of cases in the Court, there is no likelihood of any early conclusion of trial.

6. Learned A.G.A. opposed the prayer for bail.

7. 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 the absence of any convincing material to indicate the possibility of tampering with the evidence and larger mandate of the Article 21 of the Constitution of India and the law laid down by the Hon'ble Apex Court in the case of **Dataram Singh vs. State of UP and another, (2018) 3 SCC 22**, this Court is of the view that the applicant may be enlarged on bail.

8. The prayer for bail is granted. The application is **allowed.**

9. Let the applicant-**Radhe Shyam Yadav** involved in Case Crime No.89 of 2021, under Section 420 I.P.C. and 63 of Excise Act, Police Station Gulaothi, District Bulandshahr be released on bail on executing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned on the following conditions :-

(1) The applicant will not make any attempt to tamper with the prosecution evidence in any manner whatsoever.

(2) The applicant will personally appear on each and every date fixed in the court below and his personal presence shall not be exempted unless the court itself deems it fit to do so in the interest of justice.

(3) The applicant shall cooperate in the trial sincerely without seeking any adjournment.

(4)The applicant shall not indulge in any criminal activity or commission of any crime after being released on bail.

(5) The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad or certified copy issued from the Registry of the High Court, Allahabad.

(6) 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

10. It may be observed that in the event of any breach of the aforesaid conditions, the court below shall be at liberty to proceed for the cancellation of applicant's bail.

11. It is clarified that the observations, if any, made in this order are strictly confined to the disposal of the bail application and must not be construed to have any reflection on the ultimate merits of the case.

(2021)06ILR A547
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.06.2021

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Crl. Misc. Bail Application No. 16768 of 2021

Ram Prakash ...Applicant
Versus
State of U.P. ...Opp. Party

Counsel for the Applicant:
Sri Ram Surat Patel

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

Criminal Law - Criminal Procedure Code (2 of 1974) – Section 437 - Excise Act, 1958 – Section 60(2) - Indian Penal Code - Section 272 - Adulteration of food or drink intended for sale - Bail - Grant of -allegation that applicant was adultering urea in deshi liquor - applicant neither arrested from the alleged spot nor any illegal material recovered from the possession of the applicant - no offence under any Section of I.P.C. made out - offence does not cover beyond the offence of the Excise Act - offence u/s 60(2) Excise Act is triable by Magistrate - no criminal history of the applicant – Bail granted (Para 3, 4, 9)

Allowed. (E-4)

List of Cases cited:-

1. Dataram Singh Vs St. of U.P. & anr., (2018) 3 SCC 22

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

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

2. Applicant has moved the present bail application seeking bail in Case Crime No. 142 of 2021, under Section 60(2) of U.P. Excise Act and Section 272 I.P.C., P.S. Kotwali Orai, District Jalaun.

3. Learned counsel for applicant submits that a false and concocted F.I.R. has been lodged by the informant against the applicant on 25.02.2021 at 11:20 P.M. Learned counsel for applicant submits that as per the FIR version, the informant-Sri Ashok Kumar Verma, Sub-Inspector alongwith some other police personnel on the information of Mukhbir Khas raided at the shop of parchoon where applicant was adultering urea in deshi liquor. The police arrested the applicant and recovered 200 pieces of polythene, 500 gram urea and 20 liters of deshi liquor from his possession. The entire prosecution story made in the FIR is false, fabricated and concocted due to non-fulfilment of their illegal demand. The offence under Section 60(2) Excise Act is triable by Magistrate and no case is made out in any section of the IPC. There is no criminal history of the applicant.

4. Learned counsel for the applicant submits that the applicant has falsely been

implicated in the present case due to ulterior motive. There is no allegation in the F.I.R. that any person died while consuming the said liquor. He further submits that the police with malafide intention has been regularly lodging F.I.Rs. against those persons, who have either caught or being seen nearby some places where the country made liquor is being sold by the Government license holders.

5. He further submits that the whole prosecution story is false and concocted. The applicant has neither been arrested from the alleged spot nor any illegal material has been recovered from the possession of the applicant. The recovery memo is totally false. He further submits that no offence under any Section of I.P.C. is made out. The offence does not cover beyond the offence of the Excise Act. Thus, the prosecution case does not go beyond the purview of the Excise Act.

6. Several other submissions in order to demonstrate the falsity of the allegations made against the applicant 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 applicant 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 the accused is not having any criminal history and he is in jail since 26.02.2021 and that in the wake of heavy pendency of cases in the Court, there is no likelihood of any early conclusion of trial.

7. Learned A.G.A.has opposed the bail application.

8. 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 larger mandate of Article 21 of the Constitution of India and the law laid down by the Hon'ble Apex Court in the case of **Dataram Singh vs. State of UP and another, reported in (2018) 3 SCC 22**, this Court is of the view that the applicant may be enlarged on bail.

9. The prayer for bail is granted. The application is allowed.

10. Let the applicant- **Ram Prakash** involved in Case Crime No. 142 of 2021, under Section 60(2) of U.P. Excise Act and Section 272 I.P.C., P.S. Kotwali Orai, District Jalaun, be released on bail on his executing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned on the following conditions :-

(1) The applicant will not make any attempt to tamper with the prosecution evidence in any manner whatsoever.

(2) The applicant will personally appear on each and every date fixed in the court below and his personal presence shall not be exempted unless the court itself deems it fit to do so in the interest of justice.

(3) The applicant shall cooperate in the trial sincerely without seeking any adjournment.

(4) The applicant shall not indulge in any criminal activity or commission of any crime after being released on bail.

(5)The party shall file computer generated copy of such order downloaded from the official website of High Court Allahabad or certified copy issued from the Registry of the High Court, Allahabad.

(6) 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

11. It may be observed that in the event of any breach of the aforesaid conditions, the court below shall be at liberty to proceed for the cancellation of applicant's bail.

12. It is clarified that the observations, if any, made in this order are strictly confined to the disposal of the bail application and must not be construed to have any reflection on the ultimate merits of the case.

(2021)06ILR A549
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 27.05.2021

BEFORE

THE HON'BLE RAVI NATH TILHARI, J.

Service Single No. 10297 of 2021

Smt. Sandhya Yadav ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Arun Kumar Verma, Arun Kumar Yadav

Counsel for the Respondents:
C.S.C.

A. Service Law – Compassionate Appointment - U.P. Recruitment of Dependents of Government Servants (Dying in Harness) Rules, 1974 - Rule 2(c) - U.P. Intermediate Education Act, 1921 - Regulations 103, 107, Section 16-G.

Words and Phrases – "*Member of the Family*" – Regulation 103 - "Member of the family" as per the "explanation" given in Regulation 103, means widow/widower, son, unmarried or divorced daughter of the deceased employee. On a plain reading of Regulation 103, 'married daughter' is not covered under the expression "member of the family". (Para 11, 15)

Words and Phrases – 'तात्पर्य' - The expression "member of family" in Regulation 103, uses the word 'तात्पर्य'. In legal Glossary, 4th Edition 1988, published by the Central Government, Department of Law and Justice, the English meaning of 'तात्पर्य' is, i) purport; ii) tenor. The meaning of "purport", in the same Legal Glossary, is "to mean; to have its purport; to profess or claim by its tenor", and the meaning of "Tenor" in the same Legal Glossary is "apparent". (Para 12)

In Stroud's Judicial Dictionary Fifth Edition by John S. James, one of the meanings of the word "tenor" is to recite verbatim i.e. exactly as it is spoken or written. Supreme Court has held that 'purporting' is indicative of what appears on the face of it or is apparent even though in law it may not be so. (Para 13, 14)

Interpretation of Regulation 103 - The English meaning of 'तात्पर्य' is "to mean", and the use of this expression in "member of family" in Regulation 103 makes only those persons member of family, which are "apparent". Those who are included are apparent and those who are not included are not apparent and cannot be the member of family in Regulation 103. 'Member of family' in Regulation 103 is therefore exhaustive of the list of members mentioned therein, as, had it been the intention of the Regulation making authority, to bring within the 'member of family' the 'married daughter', it would have been included in the like manner other relations have been specifically included. **Apparently, "married**

daughter" is not included and is not entitled for appointment on compassionate ground. (Para 15, 18, 19)

B. Words and Phrases – 'means', 'includes' - Hon'ble Supreme Court has held that a particular expression is often defined by the Legislature by using the word 'means' or the word 'includes'. Sometimes the words 'means and includes' are used. The use of the word 'means' indicates that the "definition is a hard-and-fast definition. And no other meaning can be assigned to the expression that is put down in definition." (Para 15)

Interpretation of statute - U. P. Recruitment of Dependants of Government Servant Dying-in-Harness Rules, 1974 - Rule 2(c) - The Hon'ble Full Bench of Allahabad High Court has held that the definition of 'family' in Rule 2(c) is exhaustive, in spite of the fact that the word 'includes' was used in the rule. The Hon'ble Full Bench held that 'includes', was used in the sense of 'means' as by specifying the relatives in reference to family the intention appeared to be to make the definition exhaustive. (Para 16)

Smt. Vimla Srivastava (infra) held Rule 2(c) to be illegal and unconstitutional for being violative of Article 14 and 15, for not including 'married daughter' in the expression 'family'. Petitioner's submission to apply the same ratio to the present case was not considered as Smt. Vimla Srivastava (infra) did not notice Sunita Bhadauriya (infra), which negatived the challenge to the constitutionality of Rule 2(c) on the same ground. Court observed that in the present case there is no challenge to the vires of Regulation 103 as regards definition of 'member of family'. (Para 21, 22)

Liberty to file fresh writ petition including the prayer to challenge the vires of Regulation 103 of the Regulations, is granted.

Writ petition disposed off. (E-3)

Precedent followed:

1. Azimunnissa & ors. Vs The Deputy Custodian, Evacuee Properties, District Deoria & ors., AIR 1961 SC 365 (Para 14)

2. P. Kasilingam Vs P.S.G. College of Technology, AIR 1995 SC 1395 (Para 15)

3. Km. Shehnaj Begum Vs St. of U.P. & ors. AIR 2014 Allahabad 66 (FB) (Para 16, 17)

4. Sunita Bhadauriya Vs St. of U.P. & ors., (2006) 1 UPLBEC 754 (DB) (Para 22)

Precedent distinguished:

1. Smt. Vimla Srivastava Vs. St. of U.P. & anr. , 2016 (1) ADJ 21 (Para 4, 7, 20, 21)

2. Manjul Srivastava Vs St. of U.P. & ors., Writ-A No. 10928 of 2020 (Para 4, 7, 20)

Precedent cited:

1. Neha Srivastava Vs St. of U.P., Special Appeal Defective No. 863 of 2015 (Para 4)

Books Referred:

1. Legal Glossary, 4th Edition 1988, published by the Central Government, Department of Law and Justice (Para 12)

2. Stroud's Judicial Dictionary Fifth Edition by John S. James (Para 13)

(Delivered by Hon'ble Ravi Nath Tilhari, J.)

1. Heard Sri Arun Kumar Verma, learned counsel for the petitioner and Sri Pankaj Srivastava, learned Additional Chief Standing Counsel for opposite Party No. 1 to 5.

2. This writ petition has been filed for the following reliefs:

*i) Issue a writ, order or direction in the nature of "**Mandamus**" commanding the opposite party No.4 to consider and take appropriate decision for compassionate appointment of petitioner under Dying in Harness due to the death of father of petitioner, in accordance with the provisions of U.P. Recruitment of Dependents of Government Servants (Dying in Harness) Rules 1974 after taking into consideration the law laid down by this*

Hon'ble Court in the case of Smt. Vimla Srivastava Vs. State of U.P. and another reported in 2016 (1) ADJ 21.

ii) Issue any other order or direction, which this Hon'ble Court deems fit and proper in the circumstances of the case in favour of the petitioner in the interest of justice.

iii) Award the cost of the writ petition in the favour of the petitioner."

3. Learned counsel for the petitioner submits that the petitioner's father, Sri Indrapal Yadav, who was working on the regular post of Senior Assistant at Kishan Higher Secondary School, Ismailpur, Barabanki died on 25.07.2020 during his service period. The petitioner, who is the married daughter of Late Indrapal Yadav applied for her appointment on compassionate ground. The petitioner's mother, Smt Kanti Devi (widow of Late Indrapal Yadav) had also given her no objection in favour of the petitioner. The Principal of Kishan Higher Secondary School, Ismailpur, Barabanki forwarded the petitioner's application after completing all the formalities, for the petitioner's compassionate appointment to the post of Class-IV, to the District Inspector of Schools, Barabanki on 18.01.2020. The District Inspector of Schools, vide a letter dated 22.03.2021 (Annexure 3 to the writ petition) wrote to the Principal, Kishan Higher Secondary School, Ismailpur, Barabanki that the married daughter cannot be given appointment on compassionate ground, as there was no such Government Order.

4. Learned counsel for the petitioner submits that the petitioner being the married daughter of Late Indrapal Yadav, is entitled for consideration for appointment on compassionate ground. In support of his contention, he has placed reliance on the judgments of this court in the cases of **Smt. Vimla Srivastava Vs. State of U.P. and another reported in 2016 (1) ADJ 21; Neha Srivastava Vs. State of U.P. passed in Special Appeal Defective No. 863 of 2015** as also in **Manjul Srivastava Vs. State of U.P. and others** passed in Writ-A No. 10928 of 2020.

5. Sri Pankaj Srivastava, learned Additional Chief Standing Counsel submits that the petitioner's case would not be governed by the U.P. Recruitment of Dependents of Government Servants (Dying in Harness) Rules, 1974 (in short, "Rules, 1974'), but by the U.P. Intermediate Education Act, 1921 ("in short, "Act, 1921')under which specific provision, Regulations 103 and 107 in Chapter III, has been made with respect to appointment on compassionate ground, under which married daughter is not covered for compassionate appointment.

6. I have considered the submissions advanced by the learned counsel for the parties and perused the material on record.

7. In the case of **Smt. Vimla Srivastava (supra),** the Division Bench of this court held that the exclusion of married daughters from the ambit of the expression "family" in Rule 2 (c) of the Rules, 1974 is illegal and un-constitutional being violative of Articles 14 and 15 of the Constitution of India. The word "married daughter" in Rule 2 (c) (iii) of the Rules,1974 was struck down, holding that the married daughter cannot be excluded from consideration only on the ground of her marital status. In the case of **Manjul Srivastava (supra)** also it was held that a daughter, irrespective to her married status is to be regarded as the member of the Government Servant family

in the same manner as a son, whether married or un-married, under Rule 2 (c) (iii) of the Rules, 1974.

8. The aforesaid judgments relate to the definition of "family' under Rule 2 (c) of the Rules, 1974, which applies to the Dependents of the Government Servant Dying-in-Harness.

9. The petitioner's father was a Senior Assistant in Kishan Higher Secondary School, Ismailpur, Barabanki. Learned counsel for the petitioner, on a querry made to him, stated that the Kishan Higher Secondary School, is a recognized Intermediate College and is receiving grant-in-aid from the State Government, to which the provisions of the Intermediate Education Act applies.

10. It is, therefore, appropriate to refer Regulations 103, 104, 105, 106 and 107 in Chapter III, of the Regulations under Section 16-G of the Intermediate Education Act, 1921, which read as under:-

"103. इस विनियमावली में दी गई किसी बात के होते हुए भी जहॉ किसी मान्यता प्राप्त, सहायता प्राप्त संस्था का अध्यापक या शिक्षणेत्तर कर्मचारी वर्ग के किसी कर्मचारी की, जो विहित प्रकिया के अनुसार नियुक्त किया गया हो, सेवा काल में मृत्यु हो जाये, तो उसके कुटुम्ब के एक सदस्य को, जो 18 वर्ष से कम आयु का न हो, प्रशिक्षित स्नातक की श्रेणी में अध्यापक के पद रूप मे या किसी शिक्षणेत्तर पद पर, यदि वह पद के लिये विहित अपेक्षित श्शैक्षिक प्रशिक्षण अर्हताये, यदि कोई हों, रखता हो और नियुक्ति के लिये अन्यथा उपयुक्त हो, नियुक्त किया जा सकता हैः

स्पष्टीकरण– इस विनियम के प्रयोजनार्थ 'कुटुम्ब का सदस्य' का तात्पर्य मृत कर्मचारी की विधवा/विधुर, पुत्र अविवाहित या विधवा पुत्री से होगा।

टिप्पणी– यह विनियम और विनियम 104 से 107 तक उन मृत कर्मचारियों के संबंध में लागू होंगे जिनकी मृत्यु 1 जनवरी, 1981 को या उसके पश्चात हुई हो।

104- किसी मान्यता प्राप्त, सहायता प्राप्त संस्था का प्रबन्धतन्त्र मृत्यु होने के दिनांक से सात दिन के भीतर निरीक्षक को मृत कर्मचारी के कुटुम्ब के सदस्यों की एक रिपोर्ट प्रस्तुत करेगा जिसमें मृत कर्मचारी का नाम, धृत पद, वेतनमान, नियुक्ति का दिनांक, मृत्यु का दिनांक, नियोजक संस्था का नाम ओर उसके कुटुम्ब के सदस्यों के नाम, उनकी श्शैक्षिक प्रशिक्षण अर्हताएं यदि कोई हों, और आयु का विवरण भी दिया जाएगा। निरीक्षक अपने द्वारा रखे जाने वाले रजिस्टर में मृतक की विशिष्टियॉ दर्ज करेगा।

105- विनियम 103 में निर्दिष्ट मृत कर्मचारी के कुटुम्ब का कोई सदस्य सम्बन्धित निरीक्षक को यथास्थिति, प्रशिक्षित स्नातक श्रेणी में अध्यापक या शिक्षणेत्तर सवर्ग के किसी पद पर नियुक्ति के लिए आवेदन करेगा। आवेदन पत्र पर समिति द्वारा विचार किया जायेगा और यदि समिति उसकी नियुक्ति की संस्तुति करे, तो निरीक्षक मान्यता प्राप्त, सहायता प्राप्त उस संस्था के, जिसमें आवेदक को नियुक्त किया जाना है, प्रबन्धतन्त्र को आवेदन–पत्र विनियम 106 और 107 के अनुसार नियुक्ति आदेश करने के लिए भेजेगा।

समिति में निम्नलिखित होंगे–

1- निरीक्षक अध्यक्ष

2- जिला विद्यालय निरीक्षक के कार्यालय में लेखाधिकारी सदस;

3- जिला बेसिक शिक्षा अधिकारी सदस्य

106. मृत कर्मचारी के कुटुम्ब के सदस्य की नियुक्ति उसकी श्शैक्षिक अर्हताओं के अनुसार प्रशिक्षित स्नातक श्रेणी में या किसी शिक्षेणत्तर पद पर यथासम्भव उसी संस्था में की जायेगी जहॉ मृत कर्मचारी अपनी मृत्यु के समय सेवारत था। यदि ऐसी संस्था में प्रशिक्षित स्नातक श्रेणी में किसी अध्यापक या शिक्षणेत्तर संवर्ग में कोई पद रिक्त न हो तो उसकी नियुक्ति जिले की किसी अन्य मान्यता प्राप्त, सहायता प्राप्त संस्था में जहॉ ऐसी रिक्ति हो की जायेगी–

प्रतिबन्ध यह है कि यदि जिले की किसी मान्यता प्राप्त, सहायता प्राप्त संस्था में कोई रिक्ति तत्समय विद्यमान न हो तो उस संस्था में जहॉ मृतक अपनी मृत्यु के समय सेवारत था, नियुक्ति प्रशिक्षित स्नातक श्रेणी के अध्यापक के या चतुर्थ श्रेणी के शिक्षेणत्तर पद के प्रति किसी अधिसंख्य पद के प्रति तुरन्त की जाएगी। ऐसे अधिसंख्य पद को इस प्रयोजन के लिए सृजित किया गया समझा जाएगा और उसे तब तक जारी रखा जायेगा जबतक कोई रिक्ति उस संस्था में या जिले की किसी अन्य मान्यता प्राप्त, सहायता प्राप्त संस्था में उपलब्ध न हो जाये और ऐसी स्थिति में अधिसंख्य पद

के पदधारी द्वारा की गयी सेवा की गणना वेतन निर्धारण और सेवा निवृत्ति लाभों के लिए की जायेगी। तात्पर्य

107. उस मान्यता प्राप्त, सहायता प्राप्त संस्था के प्रबन्धतन्त्र द्वारा, जिसको विनियम 105 के अधीन निरीक्षक द्वारा आवेदन–पत्र भेजा गया या आवेदन–पत्र को प्राप्ति के दिनांक से एक माह की अवधि के भीतर निरीक्षक को सूचना देते हुए नियुक्त पत्र जारी किया जायेगा।"

11. It is evident from Regulation 103 as quoted above that it provides for appointment on compassionate ground to one "member of the family' of the deceased teacher and non-teaching staff, who fulfills the requisite qualifications. "Member of the family" as per the "explanation" given in Regulation 103, means widow/widower, son, unmarried or divorced daughter of the deceased employee. On a plain reading of Regulation 103, "married daughter' is not covered under the expression "member of the family".

12. The expression "member of family" in Regulation 103, uses the word 'तात्पर्य'. In legal Glossary, 4th Edition 1988, published by the Central Government, Department of Law and Justice, विधायी विभाग, राजभाषा खंड , the English meaning of 'तात्पर्य' is, i) purport; ii) tenor. The meaning of "purport", in the same Legal Glossary, is "to mean; to have its purport; to profess or claim by its tenor", and the meaning of "Tenor" in the same Legal Glossary is "apparent".

13. In **Stroud's Judicial Dictionary Fifth Edition by John S. James**, one of the meanings of the word "tenor" is to recite verbatim i.e. exactly as it is spoken or written. It is reproduced as under:-

"1) .....

2) In libel the law attaches a technical meaning to the word "tenor", as signifying either an exact copy, or a statement of the libel verbatim. " Tenor' has so strict and technical a meaning as to make it necessary to recite verbatim" (R. v. May 1 Doug.194); but the expression "MANNER AND FORM" means nothing more than a substantial recital (Wright v. Clements 3 B. & Ald. 503). "There is a distinction to be observed between the legal terms "tenor' and "form,' and the setting out of an instrument "according to the tenor' or "according to the form.' "Tenor' has a stricter sense than "form.' In the former case, an instrument must be set out in hoec verba, but where a form is to be pursued the same strictness is not required" (per Crampton J., Mount-Cashell v. O'Neill 2 Ir. Com. Law Rep.454). In the same strict way "tenor" is construed in America (Commonwealth v. Stevens 1 Mass. 203; Commonwealth vs. Wright 1 Cush. 46; People v. Warner 5 Wend. 273).

14. The word "purport' has one of its meaning as apparent, what appears on the face of it. In **Azimunnissa and others Vs. The Deputy Custodian, Evacuee Properties, District Deoria and others AIR 1961 S.C. 365**, the Hon'ble Supreme Court has held that the word "purport' has many shades of meaning. It means fictitious, what appears on the face of the instrument; the apparent and not the legal import and therefore any act which purports to be done in exercise of a power is to be deemed to be done within that power notwithstanding that the power is not exercisable. Purporting is therefore indicative of what appears on the face of it or is apparent even though in law it may not be so."

15. In view of the aforesaid meaning, the English meaning of 'तात्पर्य' is "to mean", and the use of this expression in "member of family" in Regulation 103 makes only

those persons member of family, which are "apparent". Those who are included are apparent and those who are not included are not apparent and cannot be the member of family in Regulation 103. Apparently, "married daughter" is not included. In **P. Kasilingam Vs. P.S.G. College of Technology, AIR 1995 SC 1395** the Hon'ble Supreme Court has held that a particular expression is often defined by the Legislature by using the word 'means' or the word 'includes'. Sometimes the words 'means and includes' are used. The use of the word "means' indicates that the "definition is a hard- and-fast definition. and no other meaning can be assigned to the expression that is put down in definition."

16. It is also appropriate to refer the Full Bench judgment of this Court in **Km. Shehnaj Begum Vs. State of U.P. and others AIR 2014 Allahabad 66 (FB)**. The question referred to the Larger Bench was "Whether the definition of 'family' in rule 2 (c) of U. P. Recruitment of Dependants of Government Servant Dying-in-Harness Rules, 1974 is inclusive or exhaustive?"

The Hon'ble Full Bench answered that the definition of "family' in rule 2 (c) of U. P. Recruitment of Dependants of Government Servant Dying-in-Harness Rules, 1974 is exhaustive, in spite of the fact that the word "includes' was used in the rule. The Hon'ble Full Bench held that "includes', was used in the sense of "means' as by specifying the relatives in reference to family the intention appeared to be to make the definition exhaustive.

17. Paragraph Nos. 39 to 47 and 51 of **Km. Shehnaj Begum (supra)** read as under:

"39. In its ordinary and primary sense the word "family' signifies the collective body of persons living in one house or under one head or manager or one domestic government. What constitutes a family in a given set of circumstances or in a particular society depends upon the habits and ideas of persons constituting that society and the religious and socio-religious customs of the community to which such persons may belong. Word "family' has a different meaning under Hindu Law and Muslim Law. Family can be immediate family, expanded family and also blended family. Joint Hindu Family is a concept well recognized under Hindu Law whereas there is no such concept under Muslim Law. Word "family' has been assigned different meaning under the different enactments depending upon the context. It has been defined differently under various Rent Acts, Land Ceiling Act and Land Reforms Act. The word has been subject matter of judicial interpretation in various pronouncements.

*40. In **Devki Nandan v. Murlidar , AIR 1957 SC 133** , it has been held that 'family ' in its popular sense means ' children '.*

*41. In **Ram Chauvan v. Girija Nandini , AIR 1966 SC 323**, it has been held that word 'family' does not mean only a group of persons who are recognized in law as having a right of succession or having a claim to a share in the property in dispute.*

*42. Patna High Court in the case of **Aliv Kassan v. Torrab Hussain, AIR 1958 Pat 232** where the property was originally purchased by two sisters has held the expression 'family' includes a sister's son.*

43. Under the Mussalman Waqf Validating Act, 1930, the term "family' has been held to include both agnates and cognates and relations by blood or marriage. The nephews of the settler of

Waqf were held to be the members of the family. In ***Ismail Haji v. Umar Abdullah , AIR 1942 Bombay 775, Md . Azam Khan v. Hamid Shah, AIR 1947 Allahabad 137, Rahmanul Hasan v. Zahurul Hasan , AIR 1947 All 281****, the son of a half - brother or of a half- sister have been held to be included in the term ' family '.*

44. According to Law Lexicon 'family' may include even domestic servants and some times persons who are merely boarders.

45. The term 'family' being capable of such wide and varying meaning and having been subject matter of such wide interpretation, the use of this word in 1974 Rules cannot be left to be assigned a meaning in its general terms or as it is understood in popular sense by different sections of society nor it can be left to be assigned a meaning as it is understood in different religions or according to socio-religious custom prevalent in different communities for that would lead to a chaotic situation . Thus, the word has to be interpreted in reference to the context it has been used keeping in view the object and purpose of the Rules balancing with the mandate of equality enshrined under Articles 14 and 16 of the Constitution.

46. It is well settled principle of interpretation of Statutes that a statutory provision should not be construed in a manner which would lead to manifest absurdity, futility, or anomaly or chaos . Reference may be made to the decision of Apex Court in ***H.S. Vankani v. State of Gujarat , (2010) 4 SCC 301 : AIR 2010 SC 1714****"*

47. By specifying the relations in reference to family the intention appears to be to make the definition exhaustive. If it had been the intention to bring within the ambit of word "family ' all the relations, it was unnecessary to specify some of them. It seems to us that word " includes " has been used in the rules in the sense of " means " and according to us , this is the only construction, the word "include' can bear in the context of the rules. If the intention of the legislature was not to make the list exhaustive, there was hardly any necessity to have described dependent relations of being included in the definition of family. It also does not appear to us that relations specified in the Rules have been described ex. abundanti cautela i. e. in abundant caution for the simple reason that in case the definition of word family was left to ones imagination without specifying the relations to which it intended to extent the benefit would have resulted into totally chaotic situation leaving it open to all and sundry who could even remotely demonstrate to be a member of the family, in view of the varied definition and interpretation of the word, to claim the benefit destroying the very purpose and object of the rules much less advancing the same.

51. Thus, our answer to the reference is that definition of the family in Rule 2 (c) of U. P. Recruitment of Dependants of Government Servant Dying-in-Harness Rules, 1974 is exhaustive."

18. "Member of family' in Regulation 103 is therefore exhaustive of the list of members mentioned therein, as, had it been the intention of the Regulation making authority, to bring within the "member of family' the "married daughter', it would have been included in the like manner other relations have been specifically included. The relations which have not been included can not be read in to regulation 103, to expand the meaning of "member of the family' as by specifying the relations in reference to family, the definition has been made exhaustive.

19. Regulation 103 of the Regulations as it stands, "married daughter' is not entitled for appointment on compassionate ground.

20. Learned counsel for the petitioner submits that the "member of family" in Regulation 103, includes "unmarried daughter and widowed daughter", but it does not include "married daughter" in the like manner as the expression "family' was defined under Rule 2 (c) (iii) of the Rules, 1974, and consequently, the benefit of the judgment of this Court in the cases of Smt. Vimla Srivastava (supra) and Manjul Srivastava (supra) deserves to be extended to the petitioner on the same reasoning and the ratio as laid down in those judgments by holding that the "married daughter" is also included in Regulation 103 of the Regulations in the definition of "member of family".

21. The submission of Shri Arun Kumar Verma, learned counsel for the petitioner that applying the ratio of the Division Bench judgment in **Smt. Vimla Srivastava (supra)**, "married daughter' may also be considered to be included in "member of family' in Regulation 103 deserves no consideration in this writ petition, for the reason, that in **Smt. Vimla Srivastava (supra)** there was challenge to the vires of Rule 2(c) of the Rules, 1974. In the present case there is no challenge to the vires of Regulation 103 of the Regulations as regards definition of "member of family'.

22. Further, this court finds that in **Sunita Bhadauriya Vs. State of U.P. & others, (2006) 1 UPLBEC 754 (DB)** Rule-2(c) of the Rules, 1974, was challenged on the ground of being ultra vires Articles 14 and 39(a) of the Constitution of India, as the definition of "family' did not include "married daughter'. Such challenge was negatived by the Division Bench of this Court. The judgment in Sunita Bhadauriya (supra) was not noticed by the coordinate Bench in Smt. Vimla Srivastava(supra), which took a contrary view.

23. Learned counsel for the petitioner prays that the petitioner may be granted liberty to file fresh writ petition with better particulars making appropriate prayers including the prayer to challenge the vires of Regulation 103 of the Regulations.

24. Liberty as prayed is granted, if so advised.

25. With the aforesaid, but in view of the liberty granted, this writ petition is **disposed of** finally.

(2021)06ILR A556
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.05.2021

BEFORE

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

Writ -A No. 5985 of 2015

Ranveer Singh ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Prahlad Kumar Khare, Sri P. Khare, Sri Ram Kirit Singh, Sri Ram Kirit Singh

Counsel for the Respondents:
A.S.G.I., Sri Bhanu Pratap Singh, Sri D. Vaish, S.C.

A. Service Law – Dismissal – Disciplinary Inquiry - Procedural flaw in Departmental Inquiry - In a departmental proceedings/domestic inquiry involving a major penalty, mere documents produced before the Inquiry Officer by the

Presenting Officer for the establishment, without being proved by parole evidence of relevant witnesses, are not documentary evidence that can be read against the charged employee. They are just idle papers, from which no conclusion could be drawn. They are no evidence at all. The employee has a right to cross-examine such establishment witnesses when they do appear. (Para 19, 23)

B. Principles of Natural Justice - The departmental proceedings are quasi judicial proceedings. The Inquiry Officer functions as quasi judicial officer. He is not merely a representative of the department. He has to act as an independent and impartial officer to find out the truth. (Para 24)

C. Even if an employee prefers not to participate in enquiry the department has to establish the charge against the employee by adducing oral as well as documentary evidence. (Para 24)

In the present case, a perusal of the inquiry report does suggest that dates were fixed by the Inquiry Officer, where proceedings were held, but in those proceedings, no witness appeared on behalf of the employer /establishment to prove whatever documents were presented by the Presenting Officer. The Presenting Officer was certainly not a witness. He could not prove those papers and turn them into documents. The Inquiry Officer also could not draw conclusions from idle papers, which, apparently, he did, acting more like an officer of the Employer-Bank, rather than discharging the role of an impartial arbiter between the employer and the employee inquiring into the charges. (Para 20)

Writ petition allowed with costs. (E-3)

Precedent followed:

1. Roop Singh Negi Vs P.N.B. & ors., (2009) 2 SCC 570 (Para 23)

2. St. of U.P. Vs Aditya Prasad Srivastava & anr., 2017 (2) ADJ 554 (DB) (LB) (Para 24)

Present writ petition assails orders dated 16.07.2014 and 29.12.2014, passed by Chief Manager, Punjab National Bank and Circle Head/Appellate Authority, Punjab National Bank, Circle Office, Pilibhit Bypass, Bareilly respectively.

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

1. Heard Mr. Ram Kirti Singh, learned Counsel for the petitioner. No one appears on behalf of respondent nos. 2 and 3.

2. The petitioner is an employee of the Punjab National Bank. He is a promotee to the Clerical cadre from the Class-IV cadre. He was served with two charge-sheets, separated approximately by a year in point of time, to wit, one dated 25.03.2004 and the other dated 08.04.2005. The charge-sheet dated 25.03.2004 shall hereinafter be called as the 'first charge-sheet'. The first charge-sheet, in substance, carries a charge to the effect that the petitioner, by his application dated 07.08.1987 addressed to the Bank Manager, Branch Shekhupur, District Badaun, claimed himself to be a matriculate and on that basis, claimed officiating appointment to a post in Class-III and other benefits, attached to a post in that cadre. Subsequently, the petitioner participated in the departmental promotion examination held by the Bank for the purpose of promoting eligible Class-IV employees to the Class-III cadre, representing himself to be a matriculate. It is said in the charge sheet that it has been found by the Bank that the High School mark-sheet relied upon by the petitioner is forged, and that he secured promotion to a Class-III post by playing fraud on the Bank. The charge-sheet under reference indicates this act to fall within the definition of "gross misconduct' in

accordance with paragraph (m) of the bipartite settlement dated 10.04.2002.

3. The petitioner was asked to put in his reply within ten days. The petitioner filed a reply/written statement dated 10.05.2004, addressed to the Senior Regional Manager, Punjab National Bank, through proper channel. It appears that not much was done on the first charge-sheet by the Bank after the petitioner had put in his reply/written statement, last mentioned. The record shows that this charge-sheet was based on a complaint made by one Smt. Premwati, claiming to be the petitioner's wife, who had complained against him to the Bank vide complaint dated 19.01.2004, inter alia carrying allegations of the petitioner marrying three other women after her, besides reporting the fact that the petitioner had secured promotion to the Class-III cadre, relying on a forged High School mark-sheet. Smt. Premwati, last mentioned, did not rest content with reporting the matter to the respondent-Bank. Complaining of inaction on the Bank's part, she instituted a writ petition before this Court, being Civil Misc. Writ Petition no. 40337 of 2004, seeking a direction to the Bank to conclude the inquiry and terminate services of the petitioner on the basis of her complaint dated 19.01.2004, after due inquiry.

4. This Court vide judgment and order dated 27.10.2005, disposed of the writ petition with a direction to the Bank to conduct an inquiry into the complaint laid by the petitioner's wife, that is to say, Smt. Premwati, "dated 24.07.1978 (sic)" within four months from the date of the said judgment. It was also ordered that the competent authority will also get a copy of the Mark Sheet produced by the petitioner verified from the Uttar Pradesh Board of High School and Intermediate Education, Allahabad before arriving at any conclusion.

5. It is averred by the petitioner in paragraph nos. 13 and 15 of the writ petition that during this period of time, there was some difference, personal in nature, between the petitioner and the Branch Manager, that led to the issue of another charge-sheet to him, dated 08.04.2005. Here, the petitioner was charged with embezzlement /misappropriation of a sum of Rs. 83,940/-, that was deposited by one Pawan Mishra and another Meera Jaiswal, but not credited to their account. It was said that a cash deposit slip was issued by the petitioner to the account holder, but no entry was made thereof in the cash book or credited to the customer's account. This charge-sheet dated 08.04.2005 shall hereinafter be referred to as the 'second-charge sheet'.

6. There is little quarrel about the course of proceedings emanating from the second charge-sheet. The petitioner denied the charges and a departmental inquiry followed. The petitioner was held guilty by the Inquiry Officer and a show-cause notice was issued to the petitioner on 03.04.2006 by the Disciplinary Authority. The petitioner answered the show-cause notice. The Disciplinary Authority did not find the petitioner's reply to the show cause satisfactory, and passed an order dated 24.04.2006, dismissing the petitioner from service. This order was affirmed by the Appellate Authority on a department appeal carried by the petitioner vide order dated 13.09.2006.

7. The petitioner challenged this dismissal from service and its affirmation in appeal by the respondents founded on

the second charge sheet through Writ - A no.63874 of 2006, that was instituted before this Court. The writ petition was heard and allowed by this Court vide judgment and order dated 06.01.2012, holding proceedings to be procedurally flawed. This Court quashed the show-cause notice dated 03.04.2006, the order of dismissal from service dated 24.04.2006 and the appellate order dated 13.09.2006. Further, a mandamus was issued, directing the respondents to reinstate the petitioner in service. However, liberty was given to the respondents, if they intended to do so, to hold a fresh inquiry, attended with a remark that anything said in the judgment shall not affect the outcome of the fresh inquiry.

8. The respondents, as it appears from the averments carried in the writ petition and the affidavits exchanged here, did not initially comply with the orders of the learned Single Judge, who allowed Writ - A No. 63874 of 2006, ordering the petitioner's reinstatement in the proceedings arising from the second-charge sheet. Rather, they carried a Special Appeal to the Division Bench of this Court, about which there is not much detail available on record. However, learned Counsel for the petitioner points out that it was decided in the year 2018 and rejected. In any case, to the issue involved here, that is not of much consequence. It, however, needs to be noticed that the respondents did not readily comply with the judgment and order of the learned Single Judge in Writ - A no. 63874 of 2006, dated 06.01.2012, compelling the petitioner to prefer Contempt Application (Civil) no. 1708 of 2012. This was disposed of in terms of an order dated 16.04.2012. Now, after the contempt proceedings, the respondents reinstated the petitioner in service on a temporary basis vide order dated 13.05.2012.

9. What is somewhat intriguing is the fact that the respondents did not take advantage of the liberty given by this Court, to take proceedings afresh against the petitioner, founded on the second charge-sheet, that carried a charge regarding embezzlement. This Court must remark that it is always open to an employer to take proceedings afresh, where earlier proceedings and the resultant order have been quashed on grounds of procedural irregularity, or not to do so. But here, the respondents chose to put proceedings, or so as to speak, proceedings afresh on the basis of the second charge-sheet in limbo, and instead, opted to proceed with the first charge sheet vide order dated 06.07.2012. Again, there is no inherent illegality about this course of action adopted by the respondents. But, it does lead one to wonder if the decision to elect pursuing the first-charge sheet came about, because the respondents thought that they had better evidence forthcoming to support the charge there than that available to establish the charges carried in the second-charge sheet.

10. Be that as it may, the petitioner says that it shows bias and premeditation against him, where the respondents wish to get rid of the petitioner at any cost. This Court is not minded to go into that issue. The order dated 06.07.2012 does show that after the petitioner had submitted his reply/written statement to the first charge-sheet, departmental inquiry was initiated thereon with all seriousness after some six years, because proceedings on the said charge sheet had not gone beyond the appointment of an Inquiry Officer on 16.01.2006 despite orders of this Court dated 27.10.2005 passed in Writ Petition no. 40337 of 2004, ordering the inquiry on the first charge-sheet to be concluded

within a period of four months. Again, as said earlier, it is no less intriguing that after a long period of torpidity, the first charge-sheet was brought into action by the respondents, so much so, that the order dated 06.07.2012 directs the Inquiry Officer appointed in the matter to commence the inquiry immediately and after fixing the matter for a preliminary hearing, regular proceedings be undertaken on a day-to-day basis. The Disciplinary Authority further directed the Inquiry Officer to conclude the inquiry within a period of three months and to submit his report in quadruplicate.

11. It is true that however inexplicable the course or the wisdom of proceedings might be, no inference of bias can per se be drawn from these circumstances or the circumstances taken in their entirety. It was the petitioner's defence before the Inquiry Officer that he never applied as a matriculate candidate, seeking promotion from the Class-IV cadre to the Clerical cadre. Learned Counsel for the petitioner has drawn this Court's attention towards the HRD Division Circular no. 341 dated 06.09.2006 issued by the Punjab National Bank, Head Office, New Delhi, annexed as Annexure no.1 to the writ petition, that clearly postulates six categories of eligible persons, who could sit the departmental promotion examination. Attention of the Court is drawn towards the sixth category of Class-IV employees, who are Peons, Cash Peons, Bill Collectors, Head Peons or those having composite designation like Peon-cum-Daftry or Peon-cum-Bill Collector, or Daftry-cum-Bill Collectors etc., where the minimum eligibility is that the candidate should have passed his 8th standard examination from a recognized institution and put in not less than 8 years' service on 15.10.2006. This was the position in the earlier promotion circulars too, including the one for the year 2001, when the petitioner sat and succeeded in the departmental promotion, earning promotion on a regular basis to a Class III post.

12. Learned Counsel for the petitioner points out that there is no issue between parties that the petitioner joined service of the respondents in the Class-IV cadre as a Peon on 01.02.1984 and was, therefore, eligible to apply for departmental promotion examination on the basis of his Class VIII qualification that he held. It is said that the petitioner never represented that he was a matriculate. It is urged on behalf of the petitioner that there are multiple circumstances that would indicate that he never made the application dated 07.08.1987, seeking promotion to the Class-III cadre, on the basis of being a matriculate.

13. Amongst others, attention of this Court is drawn towards the fact that in the event the petitioner had applied to sit the departmental examination as a matriculate candidate, his computerized service record/history-sheet, a copy of which is annexed as Annexure no.12 to the writ petition, would not show his educational qualification "below matric". This computerized record was drawn up in the year 2006, whereas the petitioner, according to the charge laid against him, moved applications for officiating promotion on 13.03.1997, followed by another on 15.12.1998, and finally on 12.10.2001, seeking to sit in the regular promotion examination. It is urged that if in any of those applications, the petitioner had claimed his educational qualification to be upgraded to that of a matriculate and annexed his matriculation mark-sheet, his

matriculate qualification would reflect in the computerized service record/history-sheet drawn up in the year 2006.

14. It is argued by the learned Counsel for the petitioner that these facts of their own show that the application dated 07.08.1987 and the other applications claiming promotion thereafter, staking claim for regular promotion on the basis that the petitioner was a matriculate, are introductions to the record falsely made, together with xerox copies of some High School mark-sheets. It is also pointed out that on a perusal of the application dated 07.08.1987, which is one of the star documents relied upon by the establishment at the inquiry, a grave suspicion arises on account of the fact that it is scripted on a letterhead of the employers, meant for inter-office correspondence, which a Class-IV employee making an application seeking promotion, is not authorized to use nor can be expected to use for the purpose of writing his application, seeking to apply for promotion. To add to these vitiating circumstances about this document is the fact that the application or the annexed mark-sheet were never produced in original by the Bank. To the contrary, the Disciplinary Authority and the Appellate Authority have placed burden upon the petitioner to produce the original mark-sheet annexed to the application, which the petitioner says he never owned or ever lodged the application dated 07.08.1987, seeking officiating promotion. It has been pointed out by the learned Counsel for the petitioner that the respondents possibly secured a copy of the application dated 07.08.1987, along with some bogus copies of matriculation mark-sheets attributed to be those annexed by the petitioner, from the Police, in connection with an FIR registered against the petitioner by Smt. Premwati, who had supplied all these bogus documents to the Investigating Agency, in order to frame the petitioner. It is for the said reason that the original application dated 07.08.1987 or the other applications made, seeking promotion, were never produced as documents in original, but only photostat copy thereof.

15. It is also argued by the learned Counsel for the petitioner that at the inquiry, no witness for the establishment has been examined to prove the charges. Smt. Premwati, who laid the complaint dated 09.01.2004 against the petitioner, giving rise to the first charge-sheet, was never examined as witness. If for some reason her attendance could not be secured, it is urged that no other witness for the establishment, who had received the petitioner's application seeking promotion to the Class-III cadre annexed with the High School mark-sheet, has been examined, in order to prove that in fact, the petitioner presented the application dated 07.08.1987 along with the original mark-sheets photostat copies whereof are enclosed. Dilating on this limb of his submission, learned Counsel for the petitioner says that it is imperative in a departmental inquiry relating to a charge involving gross misconduct, which may lead to the imposition of a major penalty that witnesses on behalf of the establishment be examined to prove the charges; else a charge of this kind in the absence of witnesses proving the documents by oral evidence, cannot be sustained by the Inquiry Officer, just going through papers, that are not proved.

16. Since no one had appeared for the Bank, this Court has looked into the respondents' stand taken in the counter affidavit carefully. It is urged there that the

applications made by the petitioner, seeking promotion and annexed mark-sheets, that have been verified by the Board of High School and Intermediate Education, both appear to be forged documents, which clearly establish the charge that the petitioner had sat in the promotion examination, misrepresenting his status as a matriculate. It is further urged that the original mark-sheets would be in the petitioner's possession, inasmuch as they were returned by the Bank after the application was moved. The originals are returned to the employee concerned. In this connection, this Court has perused paragraph no. 35 of the counter affidavit. It is further stated in the counter affidavit that the petitioner declared himself to be a matriculate while applying for promotion and appeared in the departmental promotion examinations supported by mark-sheets in the years 1989, 1993, 1994, 1997, 1998, 2000 and 2001. It is said that his identity card showed him to be a matriculate as did his bio-data form filled in his own handwriting. It is also said that the petitioner has not disputed his signature on the photostat copy of the application seeking promotion, though not the contents of the application. The stand of the respondent Bank, therefore, is that in the face of these documents, it was not at all required of the Bank to examine any witness to prove the charge. The papers speak for themselves.

17. I have considered the case made out by both parties and carefully perused the record.

18. Clearly, in the opinion of this Court, it is not a case where the petitioner has admitted his guilt or accepted the charge. The fact that the written statement put in by the petitioner initially does not make a specific traverse in the precise terms of the charge, is something expected of a layman, howsoever educated he might be. The reply indicates a good enough denial of the charge; there is no admission of it. This Court does not wish to comment on the veracity of the papers relied upon by the establishment to prove the charge, because it is not the province of this Court to re-assess evidence as if it were a Court of Appeal. Nevertheless, it is certainly the jurisdiction and the duty of this Court to ensure that the decision-making process conforms to the essential requirement of a fair procedure accepted by the law.

19. It is by now well nigh settled that in a departmental proceedings/domestic inquiry involving a major penalty, the charge or the charges against an employee have to be established by the employers, not by laying papers alone before the Inquiry Officer, but also examining witnesses to prove those papers, that would turn them into documentary evidence, readable against the employee. Of course, the employee has a right to cross-examine such establishment witnesses when they do appear. Mere documents produced before the Inquiry Officer by the Presenting Officer for the establishment, without being proved by parole evidence of relevant witnesses, are not documentary evidence that can be read against the charged employee. They are just idle papers, from which no conclusion could be drawn. They are no evidence at all.

20. In the present case, a perusal of the inquiry report does suggest that dates were fixed by the Inquiry Officer, where proceedings were held, but in those proceedings, no witness appeared on behalf of the employer/establishment to prove whatever documents were presented by the

Presenting Officer. The Presenting Officer was certainly not a witness. He could not prove those papers and turn them into documents. The Inquiry Officer also could not draw conclusions from idle papers, which, apparently, he did, acting more like an officer of the Employer-Bank, rather than discharging the role of an impartial arbiter between the employer and the employee inquiring into the charges. Inquiry Officers, who are invariably officers of the establishment, like in the present case, must remember that in their role of an inquiry officer, they do not serve their employers. They have to require the Presenting Officer, who represents the employers, to establish the charges against the charge-sheeted employee by the civil standard or by preponderance of probability. In doing that, the Presenting Officer has to lead both oral and documentary evidence, particularly where the charge may entail imposition of a major penalty.

21. In the present case, no witness had appeared for the establishment to prove as to who received the application dated 07.08.1987 from the petitioner, seeking officiating promotion to a Class-III post, where he purportedly claimed to be a matriculate. If that establishment witness had appeared, he would most certainly have been asked by the defence assistant or the petitioner as to why the photostat copies of the two mark-sheets attached did not bear the petitioner's signature, assuming that the originals were returned to the petitioner. It is urged on behalf of the respondents that there could be many other questions asked of the establishment witnesses even by the Inquiry Officer.

22. This Court, though by no means intending to comment on the veracity of mere papers that were placed before the Inquiry Officer, is constrained to wonder what could have led the petitioner to annex two mark-sheets, relating to his High School Examination from the same Board. Assuming that both mark-sheets are forged, one would serve the petitioner's purpose; two mark-sheets would be suicidal. The Inquiry Officer has not at all bestowed consideration to this facet of the matter; nor have the Disciplinary Authority or the Appellate Authority. It is expected that now they would, should they choose to proceed afresh on the first charge-sheet.

23. Reverting to the issue about the procedural flaw in the departmental inquiry held, it is certainly there, in the absence of these documents being proved by the parole evidence of relevant witnesses. The Inquiry Officer, the Disciplinary Authority and the Appellate Authority, have all looked into papers that do not qualify for evidence in a departmental inquiry on a charge entailing major penalty. The conclusions of the Inquiry Officer, the Disciplinary Authority and the Appellate Authority are, therefore, all vitiated. In support of the principle that in a departmental inquiry, the establishment must prove the charges by examining witnesses, in whose absence mere papers cannot be looked into by the Inquiry Officer, there is guidance of the Supreme Court in **Roop Singh Negi v. Punjab National Bank and others, (2009) 2 SCC 570**, which read:

"14. Indisputably, a departmental proceeding is a quasi-judicial proceeding. The enquiry officer performs a quasi-judicial function. The charges levelled against the delinquent officer must be found to have been proved. The enquiry officer has a duty to arrive at a finding

upon taking into consideration the materials brought on record by the parties. The purported evidence collected during investigation by the investigating officer against all the accused by itself could not be treated to be evidence in the disciplinary proceeding. No witness was examined to prove the said documents. The management witnesses merely tendered the documents and did not prove the contents thereof. Reliance, inter alia, was placed by the enquiry officer on the FIR which could not have been treated as evidence."

24. To the same end, there is an eloquent statement of the law to be found in a Division Bench decision of this Court in **State of U.P. v. Aditya Prasad Srivastava and another, 2017 (2) ADJ 554 (DB) (LB). In State of U.P. vs. Aditya Prasad Srivastava**, where it has been held:

"17. It is trite law that the departmental proceedings are quasi judicial proceedings. The Inquiry Officer functions as quasi judicial officer. He is not merely a representative of the department. He has to act as an independent and impartial officer to find out the truth. The major punishment awarded to an employee visit serious civil consequences and as such the departmental proceedings ought to be in conformity with the principles of natural justice. Even if, an employee prefers not to participate in enquiry the department has to establish the charge against the employee by adducing oral as well as documentary evidence. In case charges warrant major punishment then the oral evidence by producing the witnesses is necessary."

(Emphasis by Court)

25. In view of the fact that this Court has found the Inquiry Officer to have held the petitioner guilty, merely on the basis of papers laid before him by the Presenting Officer, without any witness being examined on behalf of the establishment to prove those papers turning them into documentary evidence, the findings of the Inquiry Officer cannot be sustained. For the same reason, the impugned order passed by the Disciplinary Authority and its affirmation in Appeal must fall. This Court must add that there are some extreme oddities in evidence, to which the Disciplinary Authority and the Inquiry Officer must bestow due consideration. These have been pointed out during the course of this judgment. This course has been adopted by this Court not in any manner to fetter an independent evaluation of evidence by the Inquiry Officer and by the Disciplinary Authority, but to serve as some guidance, so that no perversity may creep in, into the conclusions of the Inquiry Officer or the Disciplinary Authority, should the respondents choose take proceedings afresh. It would be open to the respondents to hold proceedings afresh from the stage where the first charge sheet was served and its reply/written statement was put in by the petitioner. The entire inquiry would have to be undertaken afresh, in case the respondents elect to pursue that course of action. In doing that, the respondents shall bear in mind the guidance in this judgment.

26. It is clarified that this Court by these concluding remarks should not be understood to mean that the respondents are under a mandate to take fresh proceedings against the petitioner. Rather, the respondents should bear in mind that the petitioner has now a short time to superannuate, which may be one of the considerations to weigh with the respondents choosing to pursue fresh

proceedings or not. Whichever way it be, the decision to take fresh proceedings or not to do so, would ultimately rest with the respondents.

27. In the result, this writ petition succeeds and is **allowed** with costs. The impugned order dated 16.07.2014 passed by the Chief Manager, Punjab National Bank, Circle Office, Pilibhit Bypass, Bareilly and the appellate order dated 29.12.2014 passed by the Circle Head/Appellate Authority, Punjab National Bank, Circle Office, Pilibhit Bypass, Bareilly are hereby **quashed**. The respondents are ordered to forthwith reinstate the petitioner in service and pay him current salary regularly. In case, the respondents do not elect to initiate fresh proceedings arising out of first charge sheet, the consequential benefits shall also become payable. However, in case fresh proceedings are taken, the consequential monetary benefits would depend upon the outcome of those proceedings.

28. Let this order be communicated to the Chief Manager, Punjab National Bank, Circle Office, Pilibhit Bypass, Bareilly and the Circle Head/ Appellate Authority, Punjab National Bank, Circle Office, Pilibhit Bypass, Bareilly by the Joint Registrar (Compliance).

(2021)06ILR A565
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.06.2021

BEFORE

THE HON'BLE SANJAY YADAV, C.J.
THE HON'BLE PRAKASH PADIA, J.

Special Appeal (D) 41 of 2021

State of U.P. & Ors. ...Appellants
Versus
Jai Prakash & Anr. ...Respondents

Counsel for the Appellants:
Sri Subhash Rathi

Counsel for the Respondents:
Sri Siddharth Khare

A. Education/Service Law – Appointment - U.P. Intermediate Education Act, 1921 - Regulation 101 - U.P. High Schools And Intermediate Colleges (Payment Of Salaries Of Teachers And Other Employees) Act, 1971 - A single post of Class-III employee in the institution (Intermediate College), could only be filled up by promotion. In view of this, it is only the claim of promotion which has to be considered and not the claim of direct recruitment which has been done by the learned Single Judge in the present case. (Para 10, 11, 12)

B. It is well-settled that the powers in writ jurisdiction should not be exercised to set aside one illegal order to restore another illegal order - The Regional Level Committee while passing the order dated 05.10.2014 has not taken into consideration the fact that the entire selection process of petitioner/respondent has already been set aside by this Court and has proceeded to examine the claim of petitioner as the petitioner/respondent was appointed after following the procedure prescribed under the Act & Regulations framed there under. The reason given in the order dated 05.12.2014, which was impugned in the writ petition, although are not tenable in law, but since the selection process for the post of clerk was quashed by this Court by order dated 21.9.2010, the order impugned in the present appeal dated 3.3.2020 is not tenable and is hereby set aside. (Para 16, 17)

The appointment of petitioner/respondent, if allowed, will amount allowing a person to be appointed without following procedure of law as the selection process of the petitioner/ respondent has already been quashed by this Hon'ble Court. This is not permissible in exercise of power conferred under Article 226 of the Constitution of India. (Para 19)

Special Appeal allowed. (E-3)

Precedent followed:

1. Jai Bhagwan Singh Vs District Inspector of Schools, Gautam Budh Nagar & ors., (2006) 3 UPLBEC 2391 (Para 10, 13)

2. Ashok Kumar Pandey & ors. Vs Basic Shiksha Adhikari, Mau & ors., 1992 (3) AWC 1389 (Para 17)

3. Raghunath Vs Deputy Director of Consolidation, 1998 (1) AWC 776 (Para 18)

Special Appeal against judgment and order dated 03.03.2020, passed by learned Single Judge in Civil Misc. Writ Petition 1228 of 2015.

(Delivered by Hon'ble Prakash Padia, J.)

1. The matter is taken up through video conferencing.

2. Heard learned counsel for the parties.

3. The present Special Appeal has been filed by the appellant State challenging the judgement and order dated 03.03.2020 passed by the learned Single Judge in Writ A No.1228 of 2015.

4. It appears from perusal of the record that at Prem Puri Badagaon District Kanpur Nagar, there is an educational institution namely Jan Shikshan Inter College (In short "Institution"). The said Institution is governed by the U.P. Intermediate Education Act, 1921 and U.P. High Schools And Intermediate Colleges (Payment Of Salaries Of Teachers And Other Employees) Act, 1971 (hereinafter referred to as "Act, 1921 and Act, 1971" respectively). The Institution in question received grant in aid upto High School level. In the Institution in question, there is only one sanctioned post of clerk which was held by one Raj Kumar Uttam. He retired from service after attaining the age of superannuation on 30.05.2006. In the Institution in question, there is huge strength of the students and in order to discharge the proper work as well for disposal disposal of official work, certain computers were purchased by the Colleges Authorities. In order to fill up the post of clerk, a decision was taken by the Management to fill up the aforesaid post by way of direct recruitment by a person having full knowledge of operation of computer. In this regard an application was submitted by the Institution before the District Inspector of Schools (In short "D.I.O.S.) for grant of permission in order to fill up the aforesaid post by direct recruitment. The permission was granted by the D.I.O.S. vide its order dated 19.10.2007. Pursuant to the same, advertisement was published in two daily newspapers namely Swatantra Bharat and Times of India on 24.10.2007 and 27.10.2007 respectively. Pursuant to the aforesaid advertisement, the petitioner-respondent as well as various other candidates applied for the aforesaid post. The petitioner-respondent was found most suitable candidates by the Selection Committee. Subsequently, the papers of petitioner-respondent were transmitted before the D.I.O.S. for obtaining prior approval which is mandatory requirement as per Regulation 101 contained in Chapter III of the Act, 1921.

5. Before the aforesaid approval granted, one Narendra Singh, Class IV employee preferred Writ Petition No.57689 of 2007. In the aforesaid writ petition, interim order was granted by the learned Single Judge. Since the petitioner-respondent was not implemented in the aforesaid writ petition, he filed an application for his impleadment which was allowed. Apart

from the petitioner-respondent, another class IV employee namely Virendra Kumar also filed impleadment which was also allowed. After hearing counsel for the parties, the learned Single Judge allowed the writ petition filed by one Narendra Singh vide its judgment and order dated 21.09.2010. The learned Single Judge was pleased to cancel the advertisement dated 24.10.2007 and 27.10.2007 as well as consequential action as has been taken by the Committee of Management for Direct Appointment of Class III employee and the appointment of petitioner-respondent. Further directions were given to the Regional Level Committee headed by Regional Joint Director of Education to examine the claim of Narendra Singh as well as respondent no.6 (Virendara Kumar) and other candidates. The aforesaid order is reproduced below:-

"Heard Sri Alok Dwivedi learned counsel for the petitioner, learned Standing Counsel for the respondents no. 1, 2 and 3, Sri Arun Kumar Tiwari for the respondent no. 4, Sri R.K. Ojha for the newly impleaded respondent no. 5 and Sri Agnihotri holding brief of Sri Neeraj Kumar Pandey for the newly impleaded respondent no. 6 Virendra Kumar.

This writ petition questions the selections on the solitary sanctioned post of clerk in Jan Shikshan Intermediate College Prempur, Badagaon, District Kanpur Nagar.

The petitioner claims promotion on the said post being a Class IV employee under the provisions of Chapter II Regulation 2 of the Regulations framed under the U.P. Intermediate Education Act 1921. The committee of management has proceeded to select the respondent no. 5 by direct recruitment under the impugned advertisement dated 24.10.2007 /27.10.2007.

The respondent no. 6 Virendra Kumar has come up with a prayer that he is the senior most of the institution and therefore he should be promoted and even otherwise the claim of the petitioner deserves to be rejected.

Affidavits have been exchanged between the parties and the learned Standing Counsel has also filed a counter affidavit on behalf of the State respondent.

The submission raised is that the impugned action of the committee is in violation of the provisions of Chapter II Regulation 2 coupled with the decision of this Court in the case of Jai Bhagwan Singh Vs. District Inspector of Schools, Gautam Budh Nagar and others, reported in 2006 (3) U.P.L.B.E.C. Pg. 2391. In essence the contention is that it there is a solitary post which should be filled up by way of promotion and it cannot be filled by way of direct recruitment.

The second submission of Sri Dwivedi is that the committee of management has illegally refused to consider the claim of promotion of the petitioner inspite of the fact that the petitioner is duly qualified and further the respondent no. 6 Virendra Kumar who is senior to the petitioner has already refused to claim promotion.

The respondents have taken a stand that the selections have been held in accordance with the regulations and further the same is pending approval before the District Inspector of Schools. They submit that the claim of the petitioner even otherwise cannot be considered inasmuch as the petitioner is not the senior most Class IV employee entitled for promotion.

The aforesaid issue need not detain this court inasmuch as under the Government Order dated 19.12.2000 the

Regional Level Committee headed by the respondent no. 2 has to examine such claims and process the appointments keeping in view the provisions of Regulations 101 to 107 of Chapter III of the regulations framed under the U.P. Intermediate Education Act 1921. The claim of promotion on the post in question by the petitioner and also of the respondent no. 6 will therefore have to be examined before approval is granted to the selections held by the committee of management in favour of the respondent no. 5.

It is however to be noted that so far as the position of law is concerned the decision in the case of Jai Bhagwan Singh holds the field clearly laying down that if there is a single post of Class III in the Institution it has to be filled up by way of promotion. In view of this, it is only the claim of promotion which has to be considered and not the claim of direct recruitment.

So far as the inter-se claim between the petitioner and respondent no. 6 is concerned the issue as to whether the respondent no. 6 had refused to accept promotion or not will still have to be examined by the Regional Level Committee.

Accordingly, the advertisement dated 24th October 2003 and all consequential action taken by the committee of management for the selection and appointment of the respondent no. 5 being in teeth of judgment in the case of Jai Bhagwan Singh (supra) is hereby quashed and Regional Level Committee headed by respondent no. 2 shall now proceed to examine the claim of the petitioner and the respondent no. 6 after calling for comments from the committee of management and the District Inspector of Schools as expeditiously as possible but not later than eight weeks from the date of presentation of a certified copy of this order before the said authority.

Partly allowed."

6. Pursuant to the same, matter was placed before the Regional Level Committee. It is submitted in paragraph 15 of the writ petition that all class IV employees of the writ petition submitted their notorial affidavits by which they submitted their unwillingness for promotion on the post of clerk.

7. The Regional Level Committee after hearing all the parties concerned rejected the claim set up by the petitioner-respondent vide its order dated 21.5.2013. Aggrieved against the aforesaid order as well as the order dated 21.09.2010 passed by the learned Single Judge in Writ Petition No.57689 of 2007, Special Appeal (Defective) No.1207 of 2011 was preferred by the petitioner-respondent. The aforesaid appeal was dismissed by the Co-ordinate Bench of this Court vide its judgement and order dated 27.3.2014 while dismissing the writ petition direction was given that any person aggrieved by the order of Regional Level Committee dated 21.05.2013, he can file a separate writ petition challenging the same. The order dated 27.03.2014 is reproduced below:-

"1. We have heard Sri Vinod Kumar Singh for the appellant. Learned standing counsel appears for State respondents. Sri Alok Dwivedi appears for respondent No.6 - the petitioner in the writ petition.

2. The appeal is reported to be beyond time by one year and 48 days. Learned counsel appearing for petitioner-respondent and learned standing counsel have no objection in condoning the delay. The grounds for condonation of delay are good and sufficient. The delay is

accordingly condoned, and the appeal was heard.

3. The appellant was selected by the Committee of Management of Jan Shiksha Intermediate College, Prempur, Badagaon, District Kanpur Nagar for appointment on a vacant Class III post.

4. Sri Nagendra Singh - the petitioner, who was serving as a Class IV employee in the institution, had filed a Writ Petition No. 57689 of 2007, in which a direction was given to the Regional Level Committee headed by Joint Director of Education, to examine the claim of petitioner Sri Nagendra Singh and Sri Virendra Kumar - the respondent No.6 in the writ petition, another class-IV employee for promotion, in the light of judgment of the Court in Jai Bhawan Singh Vs. District Inspector of Schools, Gautam Budh Nagar and others [2006 (3) UPLBEC 2391], in which it was held that if there is a single post of Class III in the institution, it has to be filled up by way of promotion, and not by direct recruitment.

5. The Joint Director considered the matter of promotion, and by his order dated 21.05.2013, in pursuance to the directions issued by the Court on 21.09.2010, decided the representation directing promotion of Sri Nagendra Singh - the petitioner in Writ Petition No. 57689 of 2007, on the vacant class-III post.

4. Learned counsel appearing for the appellant states that the observation of the learned Single Judge in the judgment dated 21.09.2010, that the single post of Clerk could be filled by promotion of Class IV employee is not correct in law. All the class-IV employees who were eligible to be considered for promotion refused to be promoted by giving undertaking on notary affidavit, and in the circumstances the Regional Level Committee was also required to consider the appointment of appellant.

5. This Special Appeal is directed against order dated 21.09.2010, by which the Joint Director was required to consider the representation of petitioner - Sri Nagendra Singh in accordance with decision of the Court in Jai Bhagwan Singh. Learned Single Judge has not decided the rights of the petitioner. If the right of any aggrieved person has been affected by the order of the Regional Level Committee dated 21.05.2013, they can file a separate writ petition challenging the orders, and in which they may raise all the grounds, which are available to them in accordance with law.

6. The Special Appeal is dismissed."

8. Pursuant to the aforesaid, another writ petition was filed by the petitioner-respondent being Writ A No.23371 of 2014. After hearing learned counsel for the parties, learned Single of this Court was pleased to dispose of the writ petition vide order dated 28.04.2014 directing the Regional Level Committee to consider the case of the petitioner also for approval the selection against Class III post. It is important to note here that while giving the aforesaid directions, the earlier order passed by the Regional Level Committee dated 25.1.2013 was not interfered. The order dated 28.4.2014 passed in the aforesaid writ petition is reproduced below:-

"Heard learned counsel for the petitioner, learned Standing Counsel for the respondent nos.1, 2 & 3, Sri Arvind Upadhyay, learned counsel representing Committee of Management (respondent no.4) and Sri Alok Dwivedi, learned counsel representing respondent nos.5 to 8

who are class IV employees in the institution in question.

Jan Shiksha Inter College, Frempur Badagaon, district Kanpur Nagar is a recognised and aided institution up to Intermediate. There is one post of clerk in the institution and there are four Class IV employees working in the institution. The Committee of Management appointed the petitioner by way of direct recruitment as clerk. Initially two of the Class IV employees objected to the Selection of the petitioner on the ground that single post of clerk is to be filled up by way of promotion. The matter came up before this Court and was remitted to the Regional Level Committee for taking appropriate decision with regard to the two candidates viz Nagendra Singh, respondent no.5 and Birendra Kumar, respondent no.6 regarding their seniority and further claim for promotion to the post of Assistant Clerk. Before Regional Level Committee all the four Class IV employees working in the institution filed their affidavits stating that they were not interested for being promoted to the post of Assistant Clerk which ultimately would result into the filling up of the said post by way of direct recruitment and for consideration of the claim of the petitioner. The Regional Level Committee after considering their respective claims vide order dated 21.05.2013 has recorded that all the Class IV employees have relinquished their claim for promotion including two contesting candidates i.e. Narendra Singh and Birendra Kumar. It further records that as the direction of the High Court was only to consider the claim of the contesting Class IV employees it would not be in a position to consider the claim of the petitioner for being approved on the post of Assistant Clerk pursuant to the selection made by the Committee of Management. In the meantime against the order of the learned Single Judge directing the Regional Level Committee to take a decision the petitioner had filed an intra Court appeal being Special Appeal Defective No.1207 of 2011. During the pendency of the appeal the Regional Level Committee passed the order dated 21.05.2013. The Division Bench while deciding the aforementioned intra Court appeal filed by the petitioner has granted liberty to the petitioner to file separate writ petition challenging the order of the Regional Level Committee. As such the present petition has been filed.

The relief prayed for by means to this petition is that the order dated 21.05.2013 passed by the Regional Level Committee be quashed and further direction be issued to the Regional Level Committee to consider the claim of the petitioner for its approval on the post of Assistant Clerk in accordance with law.

Learned counsel for the Committee of Management Sri Arvind Upadhyay and the learned counsel for the Class IV employees Sri Alok Dwivedi have submitted that they have no objection if such a direction be issued.

In the opinion of the Court it is not necessary to quash the order dated 21.05.2013 but appropriate direction can be issued to the Regional Level Committee to consider the claim of the petitioner for approval on the selection against Class III posts duly made by the Committee of Management.

Accordingly this petition is disposed of with a direction to the Regional Level Committee to take an appropriate decision in the aforesaid matter in accordance with law within a period of two months from the date of production of certified copy of this order."

9. Pursuant to the aforesaid order, matter was again placed before the Regional Level Committee and the

Regional Level Committee again rejected the claim set up by the petitioner-respondent vide its order dated 05.12.2014. Aggrieved with the aforesaid order, the petitioner-respondent filed Writ Petition with the prayer to set aside the order dated 05.12.2014 passed by the Regional Level Committee with a further prayer to direct the Regional Level Committee to reconsider the claim of the petitioner-respondent and pass appropriate orders. The aforesaid writ petition filed by the petitioner-respondent was allowed by the learned Single Judge vide its judgment and order dated 03.03.2020. Aggrieved against the aforesaid order, the State-appellant filed the present Special Appeal before this Court.

10. It is argued by learned Standing Counsel appearing on behalf of the appellant that the advertisements issued by the Institution as well as all consequential actions taken by the Committee of Management for selection and appointment of petitioner-respondent was quashed by this Court. It is further argued that the aforesaid findings were not set aside in the Special Appeal filed by the petitioner-respondent and this aspect of the matter was not considered by the learned Single while passing the impugned order in Writ Petition, therefore, no relief could be granted to the petitioner-respondent. It is further argued that in view of the law laid by this Court in the case of ***Jai Bhagwan Singh v. District Inspector of Schools, Gautambudh Nagar and others, (2006) 3 UPLBEC 2391***, a single post of Class-III employee in the institution, could only be filled up by promotion. In view of this,it is only the claim of promotion which has to be considered and not the claim of direct recruitment which has been done by the learned Single Judge in the present case. It is argued that in Jai Bhagwan Singh (supra) case, following question was placed before the Larger Bench by the learned Singh Judge for consideration:-

"Whether a single post of Class III available in the Intermediate College governed by the 1921 Act can be filled by way of promotion and whether the case of Palak Dhari Yadav, reported in (1999) 3 UPLBEC 2315, has been correctly decided keeping in view the opinion expressed by another Single Judge in Writ petition No.4165 of 2004 as also the pronouncement of the Apex Court in the cae of B. Badami Vs. State of Mysore and All India Fedration V. Union of India."

11. The aforesaid question has been answered by a Division Bench, as under:

"19. In view of the foregoing discussions, we answer the reference in the following words.

(i) A single post of Class III available in an Intermediate college governed by 1921 Act can be filled up by way of promotion, and the case of Palak Dhari Yadav (supra) has not been correctly decided.

12. From the aforesaid law laid down by Coordinate Bench of this Court it is clear that the single post of Class III employee in Intermediate College has to filled up by promotion.

13. This Court, while deciding the writ petition no. 57896 of 2007 has quashed the advertisement dated 24.10.2003 and all the consequential action taken by the Committee of Management for

selection and appointment of petitioner/ respondent being in teeth of the judgment in case of Jai Bhawan Singh.

14. The aforesaid judgment of this Court dated 21.9.2010 passed in Writ Petition No. 57869 of 2007 has not been set aside in any subsequent proceedings including special appeal (defective) no. 1207 of 2011 filed by the petitioner/respondent.

15. Once the advertisement and all the consequential actions were quashed by this Court, there was no lawful process of selection of petitioner/respondent. The entire appointment process of petitioner/respondent was set aside by this Court, thus in absence of lawful selection process, the order impugned in the special appeal is not tenable in law and is liable to be set aside.

16. Although the Regional Level Committee while passing the order dated 5.10.2014 has not taken into consideration the fact that the entire selection process of petitioner/respondent has already been set aside by this Court and has proceeded to examine the claim of petitioner as the petitioner/respondent was appointed after following the procedure prescribed under the Act & Regulations framed there under. The reason given in the order dated 5.12.2014, which was impugned in the writ petition, although are not tenable in law, but since the selection process for the post of clerk was quashed by this Court by order dated 21.9.2010, the order impugned in the present appeal dated 3.3.2020 is not tenable and is hereby set aside.

17. It is well settled that the powers in writ jurisdiction should not be exercised to set aside one illegal order to restore another illegal order, as has been held by Division Bench of this Court in the case of ***Ashok Kumar Pandey and others Vs. Basic Shiksha Adhikari, Mau and others***, reported in ***1992 (3) AWC 1389***. The Court has held as under:

"14. As regards the last contention of Mr. Singh that before the impugned order was passed, the Appellants were not given an opportunity of being heard, it must be said that, in the facts of the instant case, it has no sub-stance. It has already been found that the concerned Appellants were not appointed as teachers. They were therefore not being deprived of any right, for which they were entiled to a prior opportunity of being heard. We hasten to add that even if we had found that they were entitled to such an opportunity and failure on the part of the Adhikari to provide them with the same made the order under challenge bad, we would not have been justified in quasffing the same for that would have amounted to putting premium upon and giving judicial imprimatur to another wrong, namely, conferment of a right upon certain persons who were not entitled to it. To put it differently, powers in writ jurisdiction should not be exercised to set aside one illegal order to restore another illegal order. In making these observations, we have drawn sustenance from the Division Bench judgment of this Court in the case of S.K.J.P.K. Inter College v. District Inspector of Schools 1988 UP LB EC 739."

18. This Court further in case of ***Raghunath Vs. Deputy Director of Consolidation, reported in 1998 (1) AWC 776*** has held as under:

"13. In its decision in the case of Ashok Kumar Pandey and others D. Basic

Shiksha Adhikari, Mau and others. Special Appeal No. 127 of 1992, decided on 22.4.1992. a Division Bench of this Court had observed that powers in writ jurisdiction should not be exercised to set aside one illegal order to restore another illegal order reiterating the view of another Division Bench of this Court in its decision in the case of SKJPK Inter College v. District Inspector of Schools 1988 U.P.L.B.E.C. 739. pointing out that quashing of an order which amounted to putting premium upon and giving Judicial imprimatur to another wrong, namely conferment of a right upon certain persons who were not entitled to it cannot be justified.

19. The appointment of petitioner/respondent, if allowed, will amount allowing a person to be appointed without following procedure of law as the selection process of the petitioner /respondent has already been quashed by this Hon'ble Court. This is not permissible in exercise of power conferred under Article 226 of the Constitution of India.

20. In view of the above discussions, the order of learned Single Judge dated 3.3.2020 passed in Writ-A No. 1228 of 2015 (Jai Prakash Uttam Vs. State of U.P. & others) is set aside.

21. Consequently, the special appeal is allowed.

(2021)06ILR A573
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.06.2021

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.

Writ -A No. 8385 of 2020

Along with
Writ -A No. 18664 of 2019

Shiv Shankar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Sanjeev Singh, Sri Ghan Shyam Yadav

Counsel for the Respondents:
C.S.C.

A. Service Law – Regularisation and payment of minimum wages - U.P. Regularization of Persons Working on Daily Wages or on Work Charge or on Contract in Government Departments on Group 'C' and Group 'D' Posts (Outside the Purview of the Uttar Pradesh Public Service Commission) Rules, 2016 - Rules 5, 6, 8, & 10 - U.P. Regularization of Daily Wages Appointment on Group 'D' Posts Rules, 2001 - Rule 4(1).

Requirement of eligibility list – Rule 6(4) - The eligibility list as contemplated under Rule 6(4) had to be prepared having regard to the provisions of Rule 6(1) which provides two cut-off dates. The first date is of initial engagement which is on or before 31.12.2001, and the second is of working or engagement or employment on 12.9.2016, the date of the commencement of the Rules. (Para 17)

Exercise of regularisation as per the procedure in the Rules' 2016 has not been completed in the department. The claim of the petitioner on individual basis had been considered under the directions of this Court. Whereas, the exercise of regularisation was required to be undertaken by the Department on its own and there was no requirement of making individual claim by one or two employee(s). The record does not reflect that any eligibility list had been prepared by the appointing authority in terms of Rule 6(4) in order of the seniority of all daily wage employees working on the date of commencement of the Rules i.e. 12.9.2016 for consideration of their candidature for regular appointment on the permanent or temporary vacancies available either on the date of

commencement of the rules, or any other vacancy available in the department subsequent thereto as per the Rule 5 of the Rules' 2016. (Para 25, 26)

B. The word "continuous working" or "continuous engagement or employment or deployment" is neither contemplated nor can be read into the Rules – Rule 6(1)(i) - The language employed in Rule 6(1)(i) nowhere requires that the incumbent must have been working continuously without any break from the date of the initial engagement till the date of the commencement of the Rules. The only requirement to be fulfilled is that the incumbent must have been engaged initially on or before 31.12.2001 and must be still engaged or employed or working as such (i.e. in the same capacity) on the date of the commencement of the Rules, i.e. 12.9.2016. (Para 17)

In the opinion of the Court, the reason being that the rule making authority had framed the rules with the clear idea in mind that it was to provide for regularisation of services of those persons who were engaged or deployed or working in the Department on daily wages, on work charge or on contract and the nature of their engagement, being in the exigencies or necessities of the Department, could not be regular or continuous. That means there may be break in service of such employees. Moreover, if daily wage engagement of an incumbent remained necessity of the Department or the requirement thereof for more than 15 years between two cut off dates, the benefit of regularisation had to be provided to him, irrespective of breaks in his service. (Para 18, 19)

C. It is well-settled that the plain and simple reading of the statute, if shows no ambiguity, the rule has to be followed as such. In the instant case, the plain and simple reading of the Rule 6(1)(i) shows no ambiguity.

"Break in service" or "artificial break" - It is further clarified that having regard to the requirement of the rules considering the nature and period of working of a daily wage employee, it is always open for the competent authority to consider as to whether long break in service between two dates, i.e. the date of initial engagement and the date of the commencement of the Rules would be a 'break in service' or the same can be ignored as 'artificial break' in a given case. What would be 'artificial break' which can be ignored while considering the eligibility of a candidate would depend upon the facts and circumstances of a particular case. (Para 20)

In the instant case, it is evident that the petitioner herein had worked for the whole year (12 months) in several years after his initial engagement in the year 1995. Besides, on the date of the commencement of the Rules i.e. on 12.9.2016, the petitioner was 'still working' in the Department as a daily wager. The initial requirement of the rules of working as daily wager between the two dates, is thus, fulfilled in the case of the petitioner. (Para 23)

Disengagement or discontinuance of the services of the petitioner in the year 2002 and again in the years 2011 and 2012 cannot be said to be break in service rather it can be seen that the daily wage engagement of the petitioner remained necessity of the Department and he was engaged and worked as Mali continuously (with artificial break), for the requirement of the department, for more than a period of 22 years (from 1995 to 2016). (Para 24)

D. Misinterpretation of statute - Rule 10 - Rule 10 clearly states that services of a person who is not found 'suitable' after consideration under the Rules shall be terminated. It is evident that the language of Rule 10 had been mis-interpreted by the respondent. (Para 27)

'Eligibility' and 'suitability' - The 'eligibility' and 'suitability' of the candidates for regularisation, thus, are two independent parameters which have to be assessed by two separate authorities at two different stages of the consideration as mentioned in Rule 6(4).

Under the rules, the 'suitability' of the candidates has to be judged by a Selection Committee on consideration of the character roll and other relevant records pertaining to the services as are necessary to assess their

suitability in accordance with the service rules. Whereas 'eligibility' of a candidate, to be included in the eligibility list prepared in accordance with Rule 6(4), is to be scrutinised by the appointing authority in terms of the conditions of Rule 6(1) of 2016 Rules.

The word used in Rule 10 is 'suitable' and not 'eligible'. That means only if a daily wage incumbent is not found 'suitable' for regular appointment after consideration by the Selection Committee on assessment of his service record such as character roll etc., he would not be entitled to continue even on daily wage basis. The same yardstick cannot be applied in a case where a daily wage incumbent is not found 'eligible' for regularisation under Rule 6(1), to be included in the list of eligible candidates, arranged by the appointing authority in accordance with Rule 6(4) for placing the same before the Selection Committee, as the question of 'suitability' of the candidate for regular appointment does not arrive at all. (Para 28)

Writ petitions allowed. Impugned orders quashed and claim for regularization to be considered afresh. (E-3)

Precedent followed:

1. Janardan Yadav Vs St. of U.P., 2008 (1) ADJ 60 (Para 22)

Present writ petitions have been filed against orders dated 04.06.2019 and 04.08.2020, passed by Divisional Director, Social Forestry Department, District- Siddharth Nagar.

(Delivered by Hon'ble Mrs. Sunita Agarwal, J.)

1. The aforementioned two writ petitions have been filed by a daily wage worker engaged as Class-IV employee (Mali) in the Social Forestry Department, Siddharth Nagar. The orders dated 04.06.2019 and 04.08.2020 passed by the Divisional Director, Social Forestry Department, District- Siddharth Nagar are subject matter of challenge, separately in the above writ petitions.

2. It is the case of the petitioner that he was initially engaged in the year 1995 as a Class-IV employee in different units of Khesaraha Range of the Forest Department in District Siddharth Nagar. Since his initial engagement, the petitioner had been continuously working as daily wager without any complaint. For some period in the interregnum he had not been engaged but the said period has to be treated as artificial break, inasmuch as, the petitioner had continuously been engaged for the need/requirement of the department from 1995 till the date of termination of his services by the impugned order dated 04.08.2020 and had been discharging the duties of Mali in the Social Forestry Department on daily wage basis.

3. When the claim of the petitioner for regularisation under the prevalent rules in the Department was not considered, he filed writ petition(A) No.51403 of 2017 (Shiv Shankar vs. State of U.P. & ors.) wherein by the order dated 18.02.2019 direction was issued to consider the claim of the petitioner for regularisation and payment of minimum wages. Pursuant thereto, the claim of the petitioner for regularisation was considered and rejected vide impugned order dated 04.06.2019 on the ground that the petitioner's services were discontinued for two long years during the entire period of his working and the same cannot be ignored as artificial break. The petitioner was, thus, held ineligible for regularisation under the Regularisation Rules, 2016. With regard to the claim of minimum wages, it was held that the petitioner having not been appointed against a sanctioned post and no appointment letter having been issued to

him, he was not entitled for grant of minimum wages.

4. During the pendency of the writ petition of 2019 challenging the order dated 04.06.2019 rejecting claim of the petitioner for regularisation and grant of minimum wages, the petitioner had also been disengaged as daily wager by the order dated 04.08.2020 on the ground that he was not found eligible for regularisation and as such he cannot continue as daily wager in terms of Rule 10 of the Regularisation Rules, 2016. The writ petition of 2020 was, thus, instituted by the petitioner to challenge the same.

5. Since the affidavits have been exchanged between the parties in previous writ petition filed in the year 2019 and both the counsels for the parties admit that the issues in both the writ petitions can be decided without calling for counter affidavit in the writ petition no.8385 of 2020, both the writ petitions were heard together and are being decided by this common judgment.

6. Challenging the orders impugned, the contention of the learned counsel for the petitioner is that the claim of the petitioner for regularisation had been rejected on a misinterpretation of the provisions of Rules, 2016. The chart of year-wise working of the petitioner, as extracted in the order impugned dated 04.06.2019, indicates that the initial engagement of the petitioner as daily wager was made in August, 1995 and the petitioner had worked for a period of 7 months in the year 1995-96. The said chart also shows that the petitioner was still working on the date of the commencement of the Regularisation Rules, i.e. in the month of September, 2016 and had also worked for 11 months and 9 months in the year 2017-18 and 2018-19; respectively. As the daily wage engagement of the petitioner was due to the necessity of the Department and he had worked for more than 10 years, the benefit of regularisation Rules, 2016 ought to have been provided to him. The discontinuance of services of the petitioner on account of non engagement in the years 2002, 2011 and 2012 cannot be treated as break in the services rendered by the petitioner as daily wage employee. The reason given in the order impugned for holding the petitioner ineligible for regularisation is, thus, illegal.

7. As regards the order dated 04.08.2020 for termination of services of the petitioner, it is contended that the respondent no.3 has misinterpreted the provisions of Rules, 2016, inasmuch as, only if a daily wager has been found unsuitable, he can be disengaged. In the case of the petitioner, his suitability for the regular post had never been assessed nor is there any such indication in the order of rejection of the claim of the petitioner for regularisation. The termination of services of the petitioner by the order dated 04.08.2020 taking recourse to the provisions of Rule 10 of Rules, 2016 is, therefore, contrary to law. Both the orders are, thus, liable to be set aside and a direction is to be issued to the respondents to regularise the services of the petitioner strictly in accordance with the Regularisation Rules, 2016.

8. Learned Standing Counsel, on the other hand, defending the order impugned states that the break of two continuous years in the total services rendered by the petitioner cannot be ignored as an artificial break. As the petitioner had not rendered continuous services from the date of

engagement till the date of the commencement of the Rules, he has rightly been held disentitled for regularisation. With the rejection of claim of the petitioner by the duly constituted committee, he cannot be allowed to continue even on daily wage basis, in view of Rule 10 of the Regularisation Rules, 2016.

9. Having heard learned counsel for the parties and perused the record, it is clear that the controversy revolves around the interpretation of the Regularisation Rules, 2016 namely the U.P. Regularisation of Persons Working on Daily Wages or on Work Charge or on Contract in Government Departments on Group 'C' and Group 'D' Posts (Outside the Purview of the Uttar Pradesh Public Service Commission) Rules, 2016 (hereinafter referred to as the 'Rules, 2016').

10. Certain relevant provisions of the said Rules are pertinent to be noted hereinunder:

"5. Subject to the provisions of rule 2, regularisation under these rules shall be done on available vacant post in a Government Department:

Provided that if vacant post is not available then, as and when required, a supernumerary post may be created with the approval of the Government.

6. (1) Any person who-

(i) was directly engaged or employed or deployed or working on daily wages or on work charge or on contract in a Government Department on Group 'C' or Group 'D' post (outside the purview of the Uttar Pradesh Public Service Commission) on or before December, 31, 2001 and is still engaged or employed or deployed or working as such on the date of the commencement of these rules; and

(ii) possessed requisite qualification prescribed for regular appointment for that post at the time of such engagement or employment or deployment on daily wages or on work charge or on contract, under the relevant service rules and, subject to the provisions of above mentioned rules 2 and 5,

shall be considered for regular appointment on Group 'C' or Group 'D' post (outside the purview of the Uttar Pradesh Public Service Commission) in permanent or temporary vacancy as may be available on the date of the commencement of these rules, on the basis of his record and suitability before any regular appointment is made in such vacancy in accordance with the relevant service rules or orders.

(2) In making regular appointments under these rules, reservations for the candidates belonging to the Schedule Castes, Schedule Tribes, Other Backward Classes of citizens and other categories, shall be made in accordance with the Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 and the Uttar Pradesh Public Services (Reservation for Physically Handicapped, Dependents of Freedom Fighters and Ex-Servicemen) Act, 1993, as amended from time to time, and the orders of the Government in force at the time of regularisation under these rules.

(3) For the purpose of sub-rule (1), the Appointing Authority shall constitute a Selection Committee in accordance with the relevant provisions of service rules.

(4) The Appointing Authority shall, having regard to the provisions of sub rule (1), prepare an eligibility list of the candidates, arranged in order of seniority as determined from the date of engagement or employment or deployment on daily wages, on work charge or on contract and,

if two or more persons are engaged or employed or deployed together, from the order in which their names are arranged in the said engagement or employment or deployment order. The list shall be placed before the Selection Committee alongwith their character rolls and such other relevant records, pertaining to them, as may be considered necessary to assess their suitability.

(5) The Selection Committee shall consider the cases of the candidates on the basis of their records, referred to in sub-rule (4), and if it considers necessary, it may interview the candidates also to assess their suitability.

(6) The Selection Committee shall prepare a list of selected candidates arranging their names in order of seniority and forward the same to the appointing authority.

7. The appointing authority shall, subject to the provisions of sub-rule (2) of rule 6, make appointments from the list prepared under sub-rule (6) of the said rule, in the order in which their names stand in the list.

8. Appointments made under these rules shall be deemed to be appointments under the relevant service rules or orders, if any.

10. The services of a person who is working on daily wages, or on work charge or on contract and who is not found suitable, after consideration under these rules, shall be terminated forthwith and, on such termination, he shall be entitled to receive one month's wages.

12. Notwithstanding anything contained in these rules, the person/persons working on daily wages or on work charge or on contract, shall have no claim for regularisation as a matter of right."

11. There is no dispute regarding the applicability of the Rules in the Social Forestry Department and that the petitioner being daily wage employee of the said Department was entitled for consideration of his claim for regularisation by the competent authority.

12. As to how and in what manner the entire exercise of regularisation of daily wager had to be made under the said Rules can be understood by the plain and simple reading of the Rules itself. As regard eligibility, under the Rules, 2016, an incumbent was required to fulfill the following conditions for consideration for regularisation:

(i) He must had been directly engaged or working on daily wage basis on Group-'C' or Group-'D' post on or before 31.12.2001; and,

(ii) he was still engaged or working as such on the date of the commencement of the Rules i.e. on 12.09.2016; and,

(iii) he must possess the requisite qualification prescribed for regular appointment for the post at the time of such engagement on daily wages under the relevant service rules, subject to the provisions of Rule 2 and Rule 5 of Rules, 2016; and,

(iv) regularisation may be made in a permanent or temporary vacancy as may be available on the date of the commencement of the Rules i.e 12.09.2016 as also the available vacancy in the Government department as per Rule 5.

13. As regards the procedure for regularisation, the rules provide that:-

(i) regular appointment be made on the basis of assessment of the service record and suitability of the daily wager in accordance with the relevant service rules or orders; and,

(ii) for the purpose of consideration for regularisation under Rule 6(1), a selection committee in accordance with the relevant provisions of the service rules is to be constituted by the appointing authority;

(iii) an eligibility list of the candidates, arranged in the order of seniority, as per their eligibility, in accordance with the provisions of Rule 6(1) has to be prepared by the appointing authority wherein seniority is to be determined from the date of engagement on daily wages, on work charge or on contract;

(iv) the said list has to be placed before the Selection Committee along with the service record of the employees such as character roll and other relevant records as is necessary to assess their suitability. On assessment of the service record of the daily wage employees, as referred in Rule 6(4) of the Rules, the selection committee may also interview the candidates to assess their suitability;

(v) after completion of the selection process, the Selection Committee has to prepare a list of selected candidates arranged in order of their seniority and forward the same to the appointing authority;

(vi) subject to the provisions of sub-rule (2) of Rule 6 which provides that the reservation rules in force at the time of regularisation under the Rules shall be applicable in making regular appointment under these rules, the appointing authority shall make appointment from the list prepared under Rule 6(6) and forwarded by the Selection Committee.

14. Rule 8 further provides that appointments made under the regularisation rules shall be deemed to be appointments under the relevant service rules. Rule 10, however, provides that in case a person who is working on daily wages, or on work charge or on contract is not found suitable, after consideration under these rules, his services shall be terminated forthwith and on such termination, he shall be entitled to receive one month's wages.

15. Having carefully gone through the entire scheme of the Rules' 2016, it is evident that the rule making authority had contemplated to complete one time exercise for consideration of claims of regularisation of daily wage employees already working in the Department on the date of commencement of the Rules 2016, that is 12.09.2016 as against the available permanent or temporary vacancies in the Department on the said date. The subsequent exercise of regularisation can be made in case of available vacancies in the department as per Rule 5.

16. As per the procedure, the appointing authority was required to prepare an eligibility list of the candidates working on daily wages, on work charge or on contract in the Department, arranged in order of seniority to be determined from the date of engagement or employment or deployment so as to place the same before the Selection Committee for consideration for regularisation.

17. The eligibility list as contemplated under Rule 6(4) had to be prepared having regard to the provisions of Rule 6(1) which provides two cut-off dates. The first date is of initial engagement which is on or before 31.12.2001, and the second is of working or engagement or employment on 12.09.2016, the date of the commencement of the Rules. The language employed in Rule 6(1)(i) nowhere requires that the incumbent must have been working continuously without any break from the date of the initial engagement till the date

of the commencement of the Rules. The only requirement to be fulfilled is that the incumbent must have been engaged initially on or before 31.12.2001 and must be still engaged or employed or working as such (i.e. in the same capacity) on the date of the commencement of the Rules, i.e. 12.09.2016.

18. The word "continuous working" or "continuous engagement or employment or deployment" is neither contemplated nor can be read into the Rules. In the opinion of the Court, the reason being that the rule making authority had framed the rules with the clear idea in mind that it was to provide for regularisation of services of those persons who were engaged or deployed or working in the Department on daily wages, on work charge or on contract and the nature of their engagement on daily wages, on work charge or on contract itself, being in the exigencies or necessities of the Department, could not be regular or continuous. That means there may be break in service of an employee engaged on daily wages, work charge or on contract, who was found covered under the rules.

19. As per the requirement of the Rules' 2016, if daily wage engagement of an incumbent remained necessity of the Department or the requirement thereof for more than 15 years between two cut off dates (from prior to December, 2001 till September 2016), the benefit of regularisation had to be provided to him, irrespective of breaks in his service. The rule nowhere requires that the incumbent must have worked continuously, without any break, from the date of initial engagement till the date of the commencement of the Rules. To read these words into the rules would amount to adding words to the statute which is not permissible in law.

20. It is well settled that the plain and simple reading of the statute, if shows no ambiguity, the rule has to be followed as such. In the instant case, the plain and simple reading of the Rule 6(1)(i) shows no ambiguity. It is further clarified that having regard to the requirement of the rules considering the nature and period of working of a daily wage employee, it is always open for the competent authority to consider as to whether long break in service between two dates, i.e. the date of initial engagement and the date of the commencement of the Rules would be a 'break in service' or the same can be ignored as 'artificial break' in a given case. For instance, if an employee had worked only for few months in some years between the above noted two cut off dates, the 'break in service' in that case cannot be treated as 'artificial break' rather the same would be 'break in service' of the employee as the Department did not require his services for a long time. The benefit of regularisation in such a case may be refused. Thus, the question as to what would be 'artificial break' which can be ignored while considering the eligibility of a candidate would depend upon the facts and circumstances of a particular case. No universal or strait-jacket formula can be derived for such an assessment. Each case has to be decided on the facts and circumstances of that case, considering the nature and period of working of the incumbent.

21. As regards the decision of the Special Appellate Court in Surendra Singh and another in Special Appeal No.1016 of 2005, which has been made basis of rejection of claim of the petitioner, relevant is to note that the said decision had been rendered in the facts and circumstances of that case. No

universal formula or rule has been prescribed in the said case so as to assess what would be the break which cannot be treated to be an 'artificial break' in service. A perusal of the said decision indicates that in the facts of the said case, it was found that the writ petitioners therein had failed to discharge the burden of establishing that they were working on daily wages in the forest department during the relevant period and the contentions of the writ petitioners therein that they had been working without payment of any wages was not accepted by the learned Single Judge, with the finding that it was difficult to believe that the writ petitioners actually worked for two years without payment of wages. While upholding the views of the learned Single Judge, the Special Appellate Bench has held therein as under:

"In the present case, the writ petitioners had not worked on daily wage basis for a long period of two years. This break cannot be treated to be an artificial break in the service. The writ petitioners did not satisfy the essential requirements contained in the 2001 Rules. They were, therefore, not entitled for regularisation under the 2001 Rules.

There is, therefore, no error in the judgment which may call for any interference in this Special Appeal.

The Special Appeal is, accordingly, dismissed."

22. At this juncture, the decision of a learned Single Judge of this Court in ***Janardan Yadav vs State of U.P. 2008 (1) ADJ 60*** is relevant to be noted wherein Rule 4(1) of the U.P. Regularisation of Daily Wages Appointment on Group 'D' Posts Rules, 2001 (Regularisation Rules 2001) pari materia to rules 2016 was the subject matter of consideration. It was observed therein as under:

"Since the Rules are applicable only to daily wage employees, the Rules framing authority was aware that such employee could not have worked continuously throughout and, therefore, has clearly provided that the engagement must be before 29.06.1991 and he is continuing as such on the date of commencement of the rules. If a daily wage engagement has been made before 29.6.2001 and was continuing on 21.12.2001, meaning thereby the daily wage engagement remained necessity of the department or the requirement thereof for more than 10 years, for such a person only, the benefit of regularisation under 2001 Rules has been provided, and it nowhere requires further that the incumbent must have worked continuously from the date of initial engagement till the commencement of these Rules and to read these words would amount to legislation, which is not permissible in law."

23. However, in the instant case, looking to the chart of year-wise working of the petitioner, extracted in the order impugned itself, it is evident that the petitioner herein had worked for the whole year (12 months) in several years after his initial engagement in the year 1995. Though the petitioner was not engaged in the years 2002, 2011 and 2012 but from the year 2003 onwards till the year 2009, he had worked for more than 10 months and even up to 12 months in one calendar year. From the year 2013 onwards till the date of the commencement of the Rules in September, 2016, the petitioner was engaged for about 9 to 11 months in one calendar year. Besides, on the date of the commencement of the Rules i.e. on 12.09.2016, the petitioner was 'still

working' in the Department as a daily wager. The initial requirement of the rules of working as daily wager between the two dates i.e. from the date of initial engagement till the date of the commencement of the Rules is, thus, fulfilled in the case of the petitioner.

24. Disengagement or discontinuance of the services of the petitioner in the year 2002 and again in the years 2011 and 2012 cannot be said to be break in service rather it can be seen that the daily wage engagement of the petitioner remained necessity of the Department and he was engaged and worked as Mali continuously (with artificial break) in the Social Forestry Department, for the requirement of the department, for more than a period of 22 years (from 1995 to 2016). The claim of the petitioner for regularisation has, thus, illegally been rejected treating the period of non-engagement as break in service, for holding him ineligible for consideration for regularisation by the Selection Committee. Thus, it can be seen that the sole ground of rejection of the candidature of the petitioner is the above noted breaks in his daily wage engagement. Other requirements of the rules had not been adverted to while rejecting his claim for regularisation.

25. The Court may further note that it seems that the exercise of regularisation as per the procedure in the Rules' 2016 has not been completed in the department. The claim of the petitioner on individual basis had been considered under the directions of this Court. The record does not reflect that any eligibility list had been prepared by the appointing authority in terms of Rule 6(4) in order of the seniority of all daily wage employees working on the date of commencement of the Rules i.e. 12.09.2016 for consideration of their candidature for regular appointment on the permanent or temporary vacancies available either on the date of commencement of the rules, or any other vacancy available in the department subsequent thereto as per the Rule 5 of the Rules' 2016.

26. Further, the reading of the Rule 6 of Rules, 2016 makes it evident that the exercise of regularisation was required to be undertaken by the Department on its own and there was no requirement of making individual claim by one or two employee(s). Further, the entire exercise of regularisation was required to be undertaken strictly in accordance with the procedure prescribed in sub-rules (4), (5) and (6) of Rule 6 of the Regularisation Rules' 2016. The Selection Committee had to be constituted to assess the suitability of all the eligible candidates arranged in the order of seniority in the list prepared by the appointing authority. On relative assessment of all eligible candidates from the said list on the basis of assessment of their service records and interview of the candidates, if considered necessary, the select list had to be prepared by the Selection Committee for forwarding the same to the appointing authority for regular appointment. The record does not indicate that any such exercise had been undertaken by the respondent. It seems that claim of individual applicant (employee) had been considered and rejected without adhering to the procedure and the requirement of the Rules' 2016.

27. Further, on the question of termination of the daily wage engagement of the petitioner taking aid of Rule 10 of the Regularisation Rules, it is evident that the language of Rule 10 had been mis-

interpreted by the respondent. Rule 10 clearly states that services of a person who is not found 'suitable' after consideration under the Rules shall be terminated. Meaning thereby that a person who is not found 'suitable' for regular appointment under the Rules would not be entitled to continue even on daily wages, or on work charge or on contract.

28. Under the rules, the 'suitability' of the candidates has to be judged by a Selection Committee on consideration of the character roll and other relevant records pertaining to the services as are necessary to assess their suitability in accordance with the service rules. Whereas 'eligibility' of a candidate, to be included in the eligibility list prepared in accordance with Rule 6(4), is to be scrutinised by the appointing authority in terms of the conditions of Rule 6(1) of 2016 Rules. The 'eligibility' and 'suitability' of the candidates for regularisation, thus, are two independent parameters which have to be assessed by two separate authorities at two different stages of the consideration as mentioned in Rule 6(4). The word used in Rule 10 is 'suitable' and not 'eligible'. That means only if a daily wage incumbent is not found 'suitable' for regular appointment after consideration by the Selection Committee on assessment of his service record such as character roll etc., he would not be entitled to continue even on daily wage basis. The same yardstick cannot be applied in a case where a daily wage incumbent is not found 'eligible' for regularisation under Rule 6(1), to be included in the list of eligible candidates, arranged by the appointing authority in accordance with Rule 6(4) for placing the same before the Selection Committee, as the question of 'suitability' of the candidate for regular appointment does not arrive at all.

29. Having said that, the Court may reiterate that the claim of the petitioner for regularisation had been rejected only on the ground that he was not eligible under Rule 6(1), inasmuch as, he had not rendered continuous services between two dates i.e. 31.12.2001 till 12.09.2016. The order of rejection of claim of the petitioner for regularisation does not state that the petitioner had not been found suitable on assessment of his service record by a duly constituted selection Committee in accordance with the sub-Rule (4) & (5) of Rule 6. As the second stage for assessment of 'suitability' of the petitioner had not been arrived in the instant case, the termination of daily wage engagement of the petitioner by the impugned order dated 04.08.2020 is found illegal.

30. In view of the above discussion, both the orders dated 04.06.2012 and 04.08.2020 are found unsustainable in the eye of law and hence quashed.

31. The petitioner herein is held entitled to continue on daily wages in the Social Forestry Department till his claim for regularisation is considered afresh strictly in accordance with the Regularisation Rules, 2016. He shall be entitled to payment of wages as is admissible to a daily wage employee of the Department as and and when the same falls due.

32. As regards the claim of regularisation of the petitioner, the matter is relegated to the respondents with the directions as follows:

(i) The appointing authority shall prepare an eligibility list in accordance with the Rule 6(4) of the Rules 2016 and constitute a Selection Committee in accordance with the Rule 6(3) for placing the same before it;

(ii) The eligibility of the candidates (daily wagers) working in the department shall be determined in accordance with the requirement of the Rule 6(1) of the Rules' 2016, considering the long period of their engagement in the necessity or requirement of the department.

(iii) The selection Committee shall consider cases of all eligible candidates included in the eligibility list placed by the appointing authority before it, in accordance with sub-rule (5) of Rule 6 and prepare the list of selected candidates as is required under Rule 6(6).

(iv) The regular appointment on the available vacancies, subject to the provisions of Rule 5 in accordance with the sub-rule (1) of Rule 6, shall be granted to all suitable candidates recommended in the select list prepared by the Selection Committee, in accordance with the Rules 7 and 8.

(v) The services of only those daily wagers included in the eligibility list who are not found suitable by the Selection Committee on assessment of their service records, can be terminated by taking recourse to the Rule 10 of the Rules by giving them one month's wages.

(vi) The entire exercise of regularisation of daily wage employees working in the Social Forestry Department, who fulfill the eligibility criteria prescribed in Rule 6(1) of 2016 Rules, in accordance with the above directions, has to be completed by the Department within a period of six months from the date of the presentation of the copy of this order. Any deviation or digression from the procedure prescribed in the Regularisation Rules' 2016 shall be seen as inaction or infraction of law and may entail adverse action against the competent authority.

33. With the aforesaid observations and directions, both the writ petitions are ***allowed.***

(2021)06ILR A584
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 14.06.2021

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Service Single No. 5995 of 2018
along with Service Single nos. 9389 of 2018, 22948 of 2019, 24443 of 2020 & 13641 of 2018

Subhash Kumar & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Laltaprasad Misra, Hari Krishna Srivastava, Prafulla Tiwari, Surendra Kumar Tripathi

Counsel for the Respondents:
C.S.C.

A. Service Law – Payment of Salary - Uttar Pradesh Provincialised National Institution (Absorption of Employees in the Government Service) Rules, 1992 - Rules 2(Ka), 2(Kha); Government Order dated 23.12.2016 - Impugned order dated 13.02.2018 has cancelled earlier GO dated 23.12.2016 whereby some educational institutions were provincialised. As a result of which, petitioners could not be paid their regular salary. Hon'ble High Court dismissed these petitions laying down following reasons.

In the absence of a sanctioned post, the High Court u/Art. 226 of the Constitution would not be justified in issuing a mandamus for the payment of salary,

particularly since a mandamus cannot lie in the absence of a legal right, based on the existence of a statutory duty. (Para 25, 28, 48)

The Government Order dated 23.12.2016 was itself conditional. The Government Order might have not been executed if the conditions mentioned in this Government Order are not satisfied in its letter and spirit. The crux of some conditions of the Government Order for making it effective within four corners of the law, is that one condition provides that the financial burden for making payment of salary etc. to the teaching and non-teaching staff shall be assessed. Further, before issuing the provincialisation order of the institution, the necessary exercise regarding creation/sanction of posts and factum of financial burden on the State Government would be examined, for making payment of salary to the teaching and non-teaching staff, with the consultation of Finance Department., Further, the teaching staff working in the provincialised institution before its provincialisation should be working against the duly sanctioned post, having proper qualification. Condition No. 1(4) provides that after carrying out required exercise in terms of the Government Order dated 23.12.2016 by the Director (Secondary), U.P., the approval shall be sought from the Hon'ble Chief Minister; thereafter the posts shall be created/sanctioned for making payment of salary by obtaining specific approval to this effect from the finance department. Like earlier occasion, it has been observed in this order that it shall not be treated as precedent. (Para 22, 23, 24, 32, 33, 45, 46)

Since the GO dated 23.12.2016 was itself a conditional order, therefore, the execution thereof was dependent upon fulfillment of conditions of the GO which have not been fulfilled by the then authorities. Hence, the GO dated 23.12.2016 was not worth executable.

B. The principle of governance has to be tested on the touchstone of justice, equity and fair play and if the decision is not based on justice, equity and fair play and has taken into consideration other matters, though on the face of it, the decision may look legitimate but as a matter of fact, the reasons are not based on values but to achieve popular accolade, that decision cannot be allowed to operate. (Para 26, 27, 38, 40, 55)

In the light of what has been said above, the Government Order dated 23.12.2016 does not appear to have been issued in a fair manner so it may not be said to be a justiciable Government Order. In fact, 'justice' means nothing more and nothing less than being fair. Therefore, the said Government Order dated 23.12.2016 has been rightly withdrawn by the impugned Government Order dated 13.2.2018. (Para 55)

In the instant case, since apparent haste has been shown in issuing Government Order dated 23.12.2016 provincialising seven educational institutions just before few days from enforcement of model code of conduct for holding Assembly Election, 2017 and without conducting the required exercise, as discussed above, such exercise of the authorities may not be appreciated. Further, the approval of the aforesaid exercise of provincialisation was given by the then Chief Minister either on the last date of election i.e. 8.3.2017 or after counting of votes on 14.3.2017 (date of counting was 11.3.2017). No exceptional circumstance or urgency has been shown by the then Government/authority in issuing such Government Order on 23.12.2016, therefore, the purpose of issuing said Government Order comes under the cloud of suspicion as it appears, prima facie, to be a lucrative Government Order extending the benefits to certain persons/institutions for forthcoming election. (Para 30, 31, 49 to 52, 56)

C. What cannot be done directly, it is not permissible to be done obliquely. In other words, whatever is prohibited by the law to be done, cannot legally be effected by an indirect manner. The authority cannot be permitted to evade a law by 'shift or contrivance'. (Para 57)

Rules of 1992 were promulgated with a view to absorb the services of teaching staff against newly created post in the provincialised institutions. In the bunch of the writ petitions, besides teaching staff so many non-teaching staff i.e. Class-III and Class-IV employees have been impleaded as petitioners and the

Absorption Rules, 1992 do not cover the service conditions of Class-III and Class-IV employees in any manner whatsoever. Not only the above, said Rules would be applicable on the teaching staff working in the provincialised institute before its provincialisation and also working against the duly sanctioned post after its provincialisation. It has nothing to do with the process of provincialisation of an institute. **As a matter of fact, Absorption Rules, 1992 would be applicable on teaching staff, not on non-teaching staff and those teaching staff should be serving in the provincialised institution before its provincialisation serving on duly sanctioned post**. Therefore, the ground taken in the impugned order dated 13.2.2018 appears to be valid one and the impugned order dated 13.2.2018 does not require any interference from this Court. (Para 34, 35, 37, 53)

In view of the factual and legal matrix of the issue, **there is no specific Act, Rule or statutory backing for passing the provincialisation order as it could have been issued in an exceptional circumstance but following the norms.** Further, the Absorption Rules, 1992 are not applicable in the case in hand, therefore, the petitioners do not have any statutory or legal right in their favour to get their institutions provincialised and in absence of any legal or statutory right, petitioners are not entitled to get any relief u/Art. 226 of the Constitution of India. (Para 29, 47, 58)

D. Applicability of Article 21-A of the Constitution - It is very much clear that Article 21-A mandates that the State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine. This constitutional provision itself provides that while following the said provision, the legal requirement would be adhered to by the State Government concerned. In the case in hand, there is no such complaint that provision of Art. 21-A is being flouted vide order dated 13.2.2018. Even no specific prayer in any writ petition has been made that the GO dated 13.2.2018 be quashed being violative of Art. 21-A. As per admitted fact by the petitioners themselves that they are imparting education in those institutions even today. (Para 42, 54)

Writ petitions dismissed. (E-2)

Precedent followed:

1. St. of U.P. through Secretary, Secondary Education & ors. Vs C/M Sri Sukhpal Intermediate College, Tirhut, Sultanpur & ors., Special Appeal Defective No 673 of 2014 (Para 25, 48)

2. Onkar Lal Bajaj & ors. Vs U.O.I. & ors., (2003) 2 SCC 673 (Para 40)

Precedent cited:

1. St. of T.N. & ors. Vs. K. Shyam Sunder & ors., (2011) 8 SCC 737 (Para 17)

2. St. of M.P. & ors. Vs. Ram Babu Tyagi & ors., order dated 25.02.2015, Civil Appeal No. 2329 of 2010 & ors. connected appeals (Para 19)

3. T.M.A. Pai Foundation Vs. St. of Karn., (2002) 8 SCC 481 (Para 21)

Petitions assail order dated 13.02.2018, passed by State Government.

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

1. Heard Sri Prashant Chandra, Sri J.N. Mathur, learned Senior Advocates assisted by Sri H.K.Srivastava and Sri Akbar Ahmad appearing on behalf of the petitioners in Writ Petition No.9389 (S/S) of 2018, Dr. L.P. Mishra, Advocate assisted by Sri Mukund Madhav Asthana in Writ Petition No.5995 (S/S) of 2018, Sri Hari Prasad Gupta, learned counsel for the petitioners in Writ Petition No.22948 (S/S) of 2019 and Writ Petition No.13641 (S/S) of 2018 and Sri Ramesh Kumar Singh, learned Additional Advocate General of U.P. assisted by Sri Pratyush Tripathi, learned Standing Counsel for the State Respondents.

2. Learned Standing Counsel has submitted that the counter affidavit of the State filed in Writ Petition No.13641 (S/S) of 2018 may be read as counter affidavit in Writ Petition No.22948 (S/S) of 2019. Likewise, the counter affidavit of the State filed in Writ Petition No.9389 (S/S) of 2018 may be read as counter affidavit in Writ Petition No.24443 (S/S) of 2020.

3. Since the rejoinder affidavits have also been filed in those writ petitions and parties are agreeable that those affidavits may be treated sufficient for all the writ petitions, therefore, those affidavits shall be treated sufficient for disposal of the bunch of these writ petitions.

4. This is the bunch of writ petitions having similar question of fact and law, therefore, with the consent of learned counsels for the respective parties of the writ petitions, these writ petitions are being decided by a common judgment and order.

5. In all the writ petitions, there are mainly two prayers; (i) quashing of the Government Order dated 13.02.2018 issued by the Secretary, Government of U.P. , Department of Education (8) Anubhag, addressing to the Director of Education (Secondary), U.P., cancelling the earlier Government Order dated 23.12.2016 whereby some Educational Institutions had been provincialised; (ii) commanding the Competent Authority to accord necessary approval under sub-para (4) of paragraph-4 of the Government Order dated 23.12.2016 and pay regular salary to the petitioners along with arrears with effect from 23.12.2016 with interest.

6. Notably, none of the writ petition has been filed by the Educational Institution which had been provincialised vide Government Order dated 23.12.2016, which has been cancelled by the impugned Government Order dated 13.02.2018. Actually, these writ petitions have been filed by the teachers and non-teaching staff, e.g. Class-II and Class IV employees, who have allegedly been teaching and serving in those Institutions taking ground that the impugned order dated 13.02.2018 is directly affecting them as despite those teachers having imparted education to the students and others have been serving in those Institutions, they are not being paid salary etc. with effect from 23.12.2016, the date when those Institutions have been provincialised by the State Government after taking over the possession of all the properties of such Institutions allegedly as per law. Further, as per learned counsel for the petitioners that since all the assets and liabilities have been taken over by the State Government so the Committee of Management of the Institutions or Institutions alone may not assail the impugned Government Order dated 13.02.2018.

7. The relevant facts, briefly, are being considered here-in-below:-

8. On 23.12.2016, the State Government issued a Government Order deciding to take over seven Educational Institutions, out of those seven Institutions, teachers and non-teaching staff of five Institutions have filed writ petitions which are before this Court for adjudication. The properties including the assets and liabilities of these Institutions have been acquired by the State Government for converting those Institutions from 'Un-aided Management Institutions' to the Government Institutions.

9. The aforesaid decision has been taken and approved by the then Chief Minister of the State of U.P. on 08.03.2017 for taking over Self-Finance Institutions by

the State Government. This exercise has been allegedly carried out in terms of Uttar Pradesh Provincialised National Institution (Absorption of Employees in the Government Service) Rules, 1992 (here-in-after referred to as the 'Absorption of Employees Rules, 1992').

10. After the aforesaid decision being taken, required exercise is said to have been carried out e.g. physical possession of the properties of the Institutions including the assets and liabilities as well as administrative control has been taken over by the legal authority i.e. the District Inspector of Schools (here-in-after referred to as the 'D.I.O.S.') concerned. Thereafter, a certificate to this effect has been issued by the Manager/ Principal of the Institution and the D.I.O.S. concerned, vide which the Management of the Institution has been handed over to the Administrator appointed by the State Government. Whereafter a transfer deed was also executed.

11. It has been submitted that the teachers and other non-teaching staff were appointed in the Institutions in question by following due procedure of law and were imparting education to the students and were serving even after the aforesaid exercise of transfer of the Institutions to the State Government is carried out. However, those teachers and other non-teaching staff are not being paid salary with effect from 23.12.2016 when the Government Order was issued taking over the Institutions by the State Government for the reason that the necessary approval from the Finance Department was to be accorded under the Government Order dated 23.12.2016. However, such approval was not accorded rather the Government Order dated 23.12.2016 has been cancelled by the subsequent Government Order dated 13.2.2018.

12. Learned counsels for the petitioners have submitted that the Institutions in question have been acquired by the State Government strictly in accordance to law and after completing all the required exercise the transfer deed was executed so the impugned order dated 13.02.2018 withdrawing the earlier Government Order dated 23.12.2016 is absolutely illegal and malafide exercise of powers and without having any cogent reasons to that effect.

13. Learned counsels for the petitioners have further submitted that it is the government which functions irrespective of the political fitment to which the ruling party for the time being might belong. A decision taken by the Cabinet of a previous government, as approved by the Chief Minister of the time governing the affairs of the State, cannot be overturned by a subsequent government belonging to another political fitment. The decision to provincialise the educational Institutions in which the petitioners have been working after their appointment duly made has been cancelled after change of the government in the year 2018, the few months after the Government Order dated 23.12.2016 provincialising the petitioners' Institutions were acted upon and implemented by taking over the assets, properties, both movable and immovable and the Management at a stage when the landed properties were duly mutated in the name of State Government through concerned D.I.O.S. The overturning of conscious decision so taken by the State Government and having duly been acted upon ultimately resulting in the final taking over of the assets and liabilities of educational Institutions and also after taking over of the management of these Institutions, management and control by

vesting the same in the State Government cannot at all be set at naught subsequently. In this regard, it has been further submitted that a purposeful and objective imparting of education is the very edifice and back-bone of a developing or even a developed society and a decision taken in public interest for imparting a quality education in some Institutions cannot at all be termed as a step contrary to public interest, rather, such steps are in furtherance of the public policy of a welfare State.

14. Further, the recital in the impugned Government Order dated 13.02.2018 has been given vide paragraph 2 (1) that there is no provision under the U.P. Intermediate Education Act, 1921 in regard to provincialisation of non-governmental Intermediate Colleges not receiving grant-in-aid nor there is any such policy prevalent in the State of U.P. nor there is any statutory rules providing for such a contingency of provinciliasation suffers from extreme arbitrariness and non-application of mind inasmuch as there has been a constant policy prevalent in the State of U.P. for provincialisation of non-aided non-governmental educational Institutions as government colleges and there are statutory rules framed in that regard in exercise of power under Article 309 of the Constitution of India known as Uttar Pradesh Provincialised National Institution (Absorption of Employees in the Government Service) Rules, 1992. Undisputedly, these rules having been framed under Article 309 of the Constitution of India were given effect to with effect from 22.07.1992 when they were published in the official gazette. This necessarily infers that there has been a policy prevalent in the State of U.P. for provincialisation of the Educational Institutions as Government Institutions.

15. Further, once rules under Article 309 of the Constitution of India have been framed laying down the conditions for exercise of power for an action on the part of the Executive Authorities of the State, it cannot at all be said, as stated in the impugned order vide paragraph-2 (2) that the proceedings for provincialisation of the petitioners' colleges was not taken after prescribing any policy nor was transparent. In this regard, the attention of this Court is invited to the rigorous conditions put in the government order to the effect that the colleges should not have any debt liability, that there should be no encumbrance on the college properties, that there should not be any dues and that there should be no dispute in regard to the Management . Therefore, it cannot at all be said reasonably that the action of taking over/ provincialisation of the colleges was not transparent.

16. Learned counsels for the petitioners have vehemently submitted that despite the impugned exercise having taken at a stage when the provincialisation was fully given effect to by taking over the movable and immovable properties including cash and fee etc. by the State Government and at a stage when even the Management of the colleges stood transferred and the transfer of immovable properties was duly affected in the village revenue records, the consequential impugned exercise of non-payment of salary to the petitioners by the State Government is violative of the fundamental right to life guaranteed to them under Article 21 of the Constitution of India and all the petitioners have been working in their respective capacities since after taking over the colleges and they have been subjected to a 'Begar' as well which is again

prohibited under the Constitutional Scheme of this great Nation.

17. Learned counsels for the petitioners have cited the dictum of Hon'ble Supreme Court in re: ***State of Tamil Nadu and others vs. K. Shyam Sunder and others reported in (2011) 8 SCC 737*** by submitting that the action taken by a previous government for betterment of the education in the Educational Institutions, where a large number of students have been taking education, cannot be and should not be nullified so arbitrary. They have mainly referred paras-31 to 35 of the aforesaid judgment, which are being reproduced here-in-below:-

"31. The Government has to rise above the nexus of vested interests and nepotism and eschew window-dressing.

"36..... the principles of governance have to be tested on the touchstone of justice, equity, fair play and if a decision is not based on justice, equity and fair play and has taken into consideration other matters, though on the face of it, the decision may look legitimate but as a matter of fact, the reasons are not based on values but to achieve popular accolade, that decision cannot be allowed to operate". (Vide: Onkar Lal Bajaj v. Union of India & Anr., AIR 2003 SC 2562).

32. In State of Karnataka & Anr. v. All India Manufacturers Organisation & Ors, this Court examined under what circumstances the government should revoke a decision taken by an earlier Government. The Court held that an instrumentality of the State cannot have a case to plead contrary from that of the State and the policy in respect of a particular project adopted by the State Government should not be changed with the change of the government. The Court further held as under:- (SCC p.706, para-59)

"59.....It is trite law that when one of the contracting parties is 'State' within the meaning of Article 12 of the Constitution, it does not cease to enjoy the character of 'State' and, therefore, it is subjected to all the obligations that 'State' has under the Constitution. When the State's acts of omission or commission are tainted with extreme arbitrariness and with mala fides, it is certainly subject to interference by the Constitutional Courts....."

(Emphasis added)

33. While deciding the said case, reliance had been placed by the Court on its earlier judgments in State of U.P. & Anr. v. Johri Mal and State of Haryana v. State of Punjab & Anr.. In the former, this Court held that the panel of District Government Counsel should not be changed only on the ground that the panel had been prepared by the earlier Government. In the latter case, while dealing with the river water-sharing dispute between two States, the Court observed thus: (SCC p.538, para-16)

"16.....in the matter of governance of a State or in the matter of execution of a decision taken by a previous Government, on the basis of a consensus arrived at, which does not involve any political philosophy, the succeeding Government must be held duty-bound to continue and carry on the unfinished job rather than putting a stop to the same."

34. In M.I. Builders (P) Ltd. v. V. Radhey Shyam Sahu & Ors., while dealing with a similar issue, this Court held that Mahapalika being a continuing body can be estopped from changing its stand in a given case, but where, after holding enquiry, it came to the conclusion that action was not in conformity with law,

there cannot be estoppel against the Mahapalika.

35. Thus, it is clear from the above, that unless it is found that act done by the authority earlier in existence is either contrary to statutory provisions, is unreasonable, or is against public interest, the State should not change its stand merely because the other political party has come into power. Political agenda of an individual or a political party should not be subversive of rule of law."

18. Therefore, on the basis of the aforesaid judgment, learned counsels for the petitioners have reiterated that the law of land is that the decision taken by the previous government cannot be changed by the subsequent government which is under legal obligation to complete decision so taken or announced by the previous government.

19. Learned counsels for the petitioners have further submitted that in an identical case decided by Hon'ble Supreme Court vide judgment and order dated ***February 25, 2015 in the case of State of Madhya Pradesh and others vs. Ram Babu Tyagi and others rendered in Civil Appeal No.2329 of 2010 and other connected appeals***, wherein the identical controversy was involved and the direction issued by the Hon'ble Madhya Pradesh High Court directing the State Government to absorb the staff members and the teachers of the school after provincialization of those schools, rejected the contention of the State Government that taking over was not in accordance with the policy and rejecting the contention raised on behalf of the State, upon the direction issued by the Hon'ble Madhya Pradesh High Court.

20. Sri Prashant Chandra, learned Senior Advocate has vehemently submitted, during course of final arguments, that if it is presumed however not admitted, that there was no specific legislation or statutory provisions in the State of U.P. regarding provincialisation of the educational Institutions, the Constitutional mandate would be used to fill the void. Further, it is the duty of the Constitutional Courts to ensure that the Constitutional guarantees are upheld and the Article under Part III of the Constitution are to be given full effect with or without any legislation in place.

21. In support of his argument, he has submitted that the provincialisation of educational Institution by various State Governments was an exercise which was being performed for quite some time. This was directly attributable to provisions contained in Article 45 of the Constitution of India. The said Article had required the State to impart free education upto the age of 14 years, but in practice, it was found that State had failed to fulfill this solemn obligation. This gave rise to dispute between private Institutions and the State Governments and the matter finally reached the Hon'ble Apex Court. After so many judgments of Hon'ble Apex Court in various matters, in ***T.M.A. Pai Foundation. vs. State of Karnataka, (2002) 8 SCC 481***, the necessity to impart free education the children of tender age was emphasized and this judgment is being consistently considered even now. Thus, in its wisdom, Parliament inserted Article 21-A by replacing Article 45 of the Constitution and a mandate to impart free quality education by the State was incorporated with effect from 2002. As per Sri Chandra for provincialising the Institutions the State appears to have promulgated the absorption Rules, 1992. Therefore, Sri Chandra has submitted vehemently that provincialising the

Institutions in question vide order dated 23.12.2016 was perfectly valid and inconformity with the Constitutional provisions and with the Absorption Rules, 1992.

22. Per contra, Sri Ramesh Kumar Singh, learned Additional Advocate General of U.P. assisted by Sri Pratyush Tripathi, learned Standing Counsel has submitted with vehemence that the required exercise, before issuing the provincialisation order of the Institutions in question, has not been carried out. Though there is no Policy, Act or Rules etc. provincialising the Institutions in question but in exceptional circumstances some Institutions were provincialised on earlier occasion without treating them as precedence. At least, before issuing the provincialisation order of the Institutions in question the posts were created/ sanctioned by the State Government with necessary financial approval after proper assessment/ examination of financial burden and another necessary aspects of the matter, whereas in the issue in question, the State Government did not perform any such burden and the order of provincialisation was passed without any assessment of financial burden and without creation of any post for the concerned Institutions, even without getting necessary financial approval from the Finance Department. He has drawn attention of this Court towards the Government Order dated 23.12.2016 wherein all the aforesaid modalities have been indicated and these modalities / conditions have not been followed by the then authorities, therefore, the said Government Order cannot be executed. The undue haste has been shown by the then authorities for provincialising seven educational Institutions for no cogent reasons, even in contravention of the specific conditions of Government Order dated 23.12.2016. As a matter of fact, the Government Order dated 23.12.2016 was conditional order and execution thereof was subject to fulfillment of those conditions which have not been followed in the present case.

23. Hence, the demand of the present petitioners for payment of salary from the State Exchequer is not appropriate, just and proper in the absence of sanctioned posts of their respective Institutions. Therefore, as per Sri Singh, the earlier instances of provincialisation of the Institutions may not be cited inasmuch as even in the exceptional circumstances at that point of time required exercise was carried out, e.g. posts were created, sanctioned by the State Government with necessary financial approval for those Institutions after proper assessment/ examination of financial burden and other necessary aspects.

24. Sri Singh has further submitted that it is clear from perusal of the note of note-sheet dated 08.03.2017, as annexed by the petitioners themselves in the writ petition, as Annexure No.2, that approval for payment of salary by the then Chief Minister was given on the basis of list approved by those concerned Institutions and without any approval of the same from the Finance Department and without sanctioning/ creating any post by adopting due procedure for the same in the concerned Institutions, makes it clear that the entire exercise is nullity in the eyes of law inasmuch as in the absence of any sanctioned post with necessary financial approval, the payment of salary against the non-existing post is not possible.

25. In support of his submissions, Sri Singh has cited the judgment of Hon'ble

Full Bench of this Court dated 12.05.2015 rendered in ***Special Appeal Defective No.673 of 2014; State of U.P. through Secretary, Secondary Education & Ors. vs. C/M Sri Sukhpal Intermediate College, Tirhut, Sultanpur & Ors.,*** whereof the operative portion is as under:-

"In the absence of a sanctioned post, a direction cannot be issued to the state in the exercise of powers under Article 226 of the Constitution for the payment of salary. The position in law, with which we respectfully concur, is as laid down in the judgment of the Full Bench in Gopal Dubey's case. The judgment in Om Prakash Verma is consistent with the law laid down in Gopal Dubey's case. In the absence of a sanctioned post, the High Court under Article 226 of the Constitution would not be justified in issuing a mandamus for the payment of salary, particularly since a mandamus cannot lie in the absence of a legal right, based on the existence of a statutory duty."

26. Sri Singh has also submitted that there is no quarrel on the point that the subsequent government should not change the stand of earlier government if the said stand is reasonable and has been taken in public interest with bonafide intention and the same qualifies the tests on touchstone of justice, equity and fair play. However, in the present case, when the date of Assembly Election was to be announced any day the provincialisation order was passed on 23.12.2016, even without determining any policy, as submitted above. He has apprised that the election notification for Assembly Election of the State of U.P. was issued by the Election Commission of India on 04.01.2017 for holding election in the State of U.P. besides other States. Accordingly, Model Code of Conduct was implemented on 04.01.2017. The election process initiated on 17.01.2017. The date of voting started from 11.02.2017 to 08.03.2017 and all the required exercise regarding election was to be finalized on 15.03.2017. Notably, all the required exercise with respect to Assembly Election was to be carried out from 17.01.2017 to 15.03.2017. If Annexure No.2 is seen for a moment, as submitted by Sri Singh, it would reveal to this Court that the then Chief Minister has given approval either on 08.03.2017 or 14.03.2017 as the Principal Secretary of the Department has noted the date as 08.03.2017 and his last signatures, after completing the exercise of getting approval from the then Chief Minister, were made on 14.03.2017 as may be seen on running page 65 of Writ Petition No.5995 (S/S) of 2018. However, no date has been indicated by the then Departmental Minister and the then Chief Minister in the said approval. Therefore, the said approval by the then Chief Minister would have been given either on the date of election i.e. 08.03.2017 or after the counting of votes.

27. Therefore, Sri Singh has submitted that in the given circumstances the date of approval for payment of salary i.e. 08.03.2017 or 14.03.2017 cannot be said to be just, appropriate and proper and even this action does not quantify the touchstone of justice, equity and fair play. It, prima-facie, appears that there might have been some extraneous considerations. As per Sri Singh, the aforesaid sole reason makes the Government Order dated 23.12.2016 nullity in the eyes of law and the same may be treated as no nest for all practical purposes. Hence, the impugned order dated 13.02.2018 cancelling the Government Order dated 23.12.2016 does not suffer from voice of illegality and

arbitrariness and should not be interfered by this Court and the writ petitions may be dismissed with costs.

28. Sri Ramesh Kumar Singh, learned Additional Advocate General has reiterated that even as per aforesaid note sheets annexed with the writ petition, it is clear that no required ground work in respect of assessment of financial burden and exercise for creation/sanction of posts was done and excessive financial burden of the same has been ignored and in absence of any sanctioned post with necessary financial approval, the payment of salary against non-existing posts was not possible. Therefore, the matter was again brought into the notice of State Government after formation of new Government for the necessary direction in accordance with law. Accordingly, on 13.2.2018, the matter was reconsidered at the level of Cabinet and after due consideration, the earlier Government Order dated 23.12.2016 was withdrawn with the Cabinet approval, which has been assailed by the petitioners in all the writ petitions.

29. Sri Singh has submitted that mainly on four grounds the Government Order dated 23.12.2016 was withdrawn vide impugned Government Order dated 13.2.2018. So far as the first ground of cancellation is concerned, Sri Singh has submitted that there is no specific policy with the State Government for provincialisation of the institutions run by the private management and there is no Statute for the same under which the institutions run by the private management could be taken under the Government establishment in the name of provincialisation. Sri Singh has submitted that he has already addressed on the point that earlier instance of provincialisation may not be cited here as such provincialisation was done in exceptional circumstances even following the due procedure of law which has not been followed in the present cases.

30. Regarding the second ground of cancellation, Sri Singh has submitted that before issuing the order of provincialisation of the institutions in question, no policy was determined for conducting the exercise of provincialisation and the same was not transparent because those institutions were provincialised after elections notification of the Assembly Election and even the approval was given by the then Chief Minister either on the last date of voting i.e. 8.3.2017 or after the completion of counting as counting completed on 11.3.2017 whereas another date as indicated in such noting is 14.3.2017.

31. So far as the third ground of cancellation is concerned, Sri Singh has submitted that the State Government is not supposed to discriminate other institutions and the provincialisation of the institutions in the aforesaid arbitrary manner will increase the demand of provincialisation in a similar manner by the similarly situated institutions or by the institutions, which might be on the better footing.

32. Regarding the fourth ground of cancellation, Sri Singh has submitted that the process of selection of the Teachers was not available with the State Government and it had not been ascertained before issuing the order of provincialisation of these institutions. Even the process of selection of teaching staff was not conducted properly. As a matter of fact, the approval for payment of salary by the then Chief Minister was given on the basis of the list provided by these concerned

institutions without any approval of the same from the Finance Department and without sanctioning or creating any post in the concerned institutions.

33. Sri Singh has also submitted with vehemence that when no proper exercise has been carried out before issuing the Government Order dated 23.12.2016 regarding provincialisation of certain institutions, the factum of transfer of movable or immovable property of the institutions to the State Government would not extend any benefit to the petitioners.

34. As per Sri Singh, so far as the Absorption Rules, 1992 are concerned, it is to submit here that this Rule does not prescribe any manner of provincialisation and it has nothing to do with the provincialisation of an institute. This Rule of 1992 was promulgated with the view to absorb the services of the teaching staff against the newly created post in the provincialised institutions. He has further submitted that in the aforesaid Rules of 1992, there is no provision for absorption of the services of non-teaching staff, hence non-teaching staff cannot claim any benefit under the said Rules of 1992, even in case of validly created posts in a provincialised institution.

35. Sri Singh has drawn attention of this Court towards one relevant fact that in the bunch of these writ petitions the petitioners are Teachers, Class-III & Class-IV employees of various Institutions, meaning thereby the petitioners are teaching and non-teaching staff and undisputedly the Absorption Rules, 1992 shall not be applicable on non-teaching staff. Therefore, in the bunch of these writ petitions the benefit of Absorption Rules, 1992 may not be claimed.

36. This fact is very much clear by perusal of Rules 2 (Ka) and 2 (Kha) of the said Rules of 1992, which are as under:-

"2. परिभाषाएँ– जब तक कि विषय या संदर्भ में को प्रतिकूल बात न हो, पद–

(क) संस्था के प्रान्तीयकरण के समय सृजित पद के सम्बंध में "नियुक्ति प्राधिकारी" का तात्पर्य किसी ऐसे प्राधिकारी से है जिसे ऐसे पद पर नियुक्त करने के लिए सशक्त किया गया हो।

(ख) किसी प्रान्तीयकृत संस्था के संबन्ध में "कर्मचारी" का तात्पर्य ऐसे व्यक्ति से है जो शिक्षण संस्था के प्रान्तीयकरण के ठीक पूर्व प्रधानाचार्य या प्रधान अध्यापक या प्रवक्ता या एल.टी. ग्रेड अध्यापक के रुप में कार्य कर रहा था और जिसे ऐसी संस्था के प्रान्तीयकरण के दिनांक को नवसृजित पद के प्रति अस्थायी नियुक्ति दी गई थी और जो तब से निरन्तर राज्य सरकार के अधीन किसी पद पर कार्य कर रहा है।....."

37. In view of the above, it is very much clear that the aforesaid Rules of 1992 were promulgated with the view to absorb the services of those teachers only, who were working in the provincialised institute before its provincialisation and also working against the duly sanctioned posts after its provincialisation. Further, it has nothing to do with the process of provincialisation of an institute. In this case the provincialisation order was issued in hurry/haste manner under the above-mentioned circumstances, without creation of any post and the main ingredient of creation of post was left out for future, hence the process of provincialisation cannot be said as completed. Besides, the Absorption Rules, 1992 shall not be applicable in the present case.

38. Sri Singh has submitted that he is also placing reliance upon the dictum of the Hon'ble Apex Court in re; Shyam Sunder (supra), which has been cited by the learned counsel for the petitioners referring para-35 of the said judgment wherein the Hon'ble Apex Court has clearly held that

'unless it is found that act done by the authority earlier in existence is either contrary to statutory provisions, is unreasonable, or is against public interest, the State should not change its stand merely because the other political party has come into power'.

Therefore, he has submitted that the act of provincialisation vide Government Order dated 23.12.2016 is not only contrary to the statutory provision but the same is unreasonable, against public interest and does not qualify the test on the touchstone of justice, equity and fair play.

39. Sri Singh has also submitted that the judgment cited by the learned counsel for the petitioners in re; **Rambabu Tyagi (supra)** would not be applicable in the present case inasmuch as the facts and circumstances of that case of State of Madhya Pradesh are not applicable in the present case inasmuch as in the State of Madhya Pradesh, there was clear cut policy of provincialisation whereas no specific policy was applicable in the State of Utter Pradesh. Further, in the present case, no ground work of any kind whatsoever, as submitted above, had been carried out and the order of provincialisation vide Government Order dated 23.12.2016 was issued in a haste manner and approval thereof was given by the then Chief Minister on 8.3.2017, in the last phase of Assembly Election, or on 14.3.2017 i.e. after completion of counting of votes on 11.3.2017, meaning thereby if the then Chief Minister had made signature on 14.3.2017, by that time he (his political party) had been defeated the Assembly Election. As per Sri Singh each cases decided by the Hon'ble Apex Court or by any Constitutional Court depend upon its own peculiar facts and circumstances and if the facts and circumstances of the case decided by the Hon'ble Apex Court are different from the case being adjudicated, that shall not be applicable thereon.

40. Sri Singh has placed reliance upon the judgment of the Hon'ble Apex Court in re; **Onkar Lal Bajaj and others Vs. Union of India and another, (2003) 2 SCC 673**, in which it is observed by the Hon'ble Apex Court in paragraph 36 of the judgment as under:-

"36. The role model for governance and decision taken thereof should manifest equity, fair play and justice. The cardinal principle of governance in a civilized society based on rule of law not only has to base on transparency but must create an impression that the decision-making was motivated on the consideration of probity. The Government has to rise above the nexus of vested interests and nepotism and eschew window-dressing. The act of governance has to withstand the test of judiciousness and impartiality and avoid arbitrary or capricious actions. Therefore, the principle of governance has to be tested on the touchstone of justice, equity and fair play and if the decision is not based on justice, equity and fair play and has taken into consideration other matters, though on the face of it, the decision may look legitimate but as a matter of fact, the reasons are not based on values but to achieve popular accolade, that decision cannot be allowed to operate."

41. In view of the above, Sri Singh has vehemently submitted that since the decision, vide Government Order dated 13.2.2018, of cancellation of provincialisation orders is just and proper and all necessary factual and legal aspects have been considered thoroughly so it

needs no interference under extra-ordinary remedy under Article 226 of the Constitution of India and therefore, the present writ petitions may be dismissed with heavy cost being misconceived.

42. As per Sri Singh, so far as the argument of Sri Prashant Chandra, learned Senior Advocate, regarding applicability of Article 21-A is concerned that is absolutely misplaced argument in the backdrop of the facts and circumstance of the present case inasmuch as it is nobody's case that on account of Government Order dated 13.2.2018 the students of tender age, below 14 years, are facing any difficulties in getting education.

43. Having heard learned counsel for the parties and having perused the material available on record, I am of the considered opinion that the purpose, authenticity, relevance and exigency in issuing the Government Order dated 23.12.2016 and its execution i.e. direction to give accord for necessary approval thereof would have to be examined carefully.

44. By means of the Government Order dated 23.12.2016, certain educational institutions were provincialised. Then Government decided to take over seven educational institutions and assets and liabilities thereof were acquired to become those unaided management institutions a Government institution.

45. Notably, the Government Order dated 23.12.2016 was itself conditional. The Government Order might have not been executed if the conditions mentioned in this Government Order are not satisfied in its letter and spirit. The crux of some conditions of the Government Order for making it effective within four corners of the law, as per my understanding, are that one condition provides that the financial burden for making payment of salary etc. to the teaching and non-teaching staff shall be assessed. Further, before issuing the provincialisation order of the institution, the necessary exercise regarding creation/sanction of posts and factum of financial burden on the State Government would be examined, for making payment of salary to the teaching and non-teaching staff, with the consultation of Finance Department. Further, the teaching staff working in the provincialised institution before its provincialisation should be working against the duly sanctioned post, having proper qualification. Condition No.1 (4) provides that after carrying out required exercise in terms of the Government Order dated 23.12.2016 by the Director (Secondary), U.P., the approval shall be sought from the Hon'ble Chief Minister; thereafter the posts shall be created/ sanctioned for making payment of salary by obtaining specific approval to this effect from the finance department. Like earlier occasion, it has been observed in this order that it shall not be treated as precedent.

46. What has been demonstrated and argued by the learned counsel for the respective parties it has been gathered that the required exercise even as per Government Order dated 23.12.2016 has not been carried out. Since the Government Order dated 23.12.2016 was itself a conditional order, therefore, the execution thereof was dependent upon fulfillment of conditions of the Government Order which have not been fulfilled by the then authorities. Hence, the Government Order dated 23.12.2016 was not worth executable.

47. No doubt, despite the clear cut policy having not been available with the

State Government for provincialising the educational institutions, however, such exercise could have been done in exceptional circumstances, as had been done in earlier occasion carrying out necessary exercise for creating and sanctioning the posts by the State Government after proper assessment and examination of financial burden and other necessary aspects of the matter taking necessary approval to that effect from the Finance Department but in the instant matter, no such required exercise has been carried out.

48. The law is trite on the point that in absence of sanctioned post, no direction could have been issued for payment of salary etc. In the case in hand, such exercise has been carried out without taking any approval from the Finance Department or without sanctioning or creating any post, therefore, the writ in the nature of mandamus cannot be issued directing the State Government to make payment of salary to the Teachers in view of the decision of the Full Bench of this Court in re; **C/M Sri Sukhpal Intermediate College, Tirhut, Sultanpur and others** (supra).

49. It would be not out of place to observe here that at the fag end of December 2016 when election notification for Assembly Election could have been issued on any date, the then State Government or the department concerned should have not shown undue haste in making seven particular institutions provincialised knowing fully well that for provincialising the institutions in question, some necessary exercise would be required to be carried out and that exercise would take some substantial time.

50. On 4.1.2017, the Election Commission of India, New Delhi has issued notification for Assembly Election of five States including Uttar Pradesh. Subsequent notification has been issued by the Chief Election Officer, U.P., Lucknow on 4.1.2017 itself. It means model code of conduct was enforced w.e.f. 4.1.2017. All required exercise for filling up nomination form and to withdraw the name was to be completed within time stipulated and date of election for certain phases was fixed from 11.2.2017 to 8.3.2017. The date of counting of the votes was fixed for 11.3.2017 and election process was to be finalized by 15.3.2017. After counting of votes, the final result was to be declared on 11/12.3.2017.

51. Admittedly, the Government Order in respect of provincialisation of seven institutions was issued on 23.12.2016 and approval was given by the then Chief Minister either on 8.3.2017 or on 14.3.2017 inasmuch as Annexure No.2 running page 65 of Writ Petition No.5995 (S/S) of 2018, Subhash Kumar and others Vs. State of U.P. and others, indicates that the Principal Secretary of the Department had completed noting on 8.3.2017 and put up before the Minister of the Department, who made signature thereon but no date has been indicated. Thereafter, the then Chief Minister made signature but no date has been indicated. However, the Principal Secretary of the Department again made signature below the signature of the then Chief Minister on 14.3.2017. Therefore, there may be every likelihood that the then Chief Minister would have given approval on the said Government Order on 14.3.2017. Even if it is assumed that he had granted approval on 8.3.2017 as submitted by all the learned counsel for the petitioners, the said date was the date for last phase of the Assembly Election, therefore, said approval was accorded after

implementation of the model code of conduct and on the last date of election. If that date is 14.3.2017, by that time the final result of Assembly Election was declared and the then Chief Minister and his political party had lost the Assembly Election. Therefore, in that case the approval was granted after loosing the Assembly Election.

52. In the given circumstances, this Court will have to visualize the propriety of the concerning authorities and action thereof carefully. The simple question crops up in the mind of the Court as to whether if the provincialisation order dated 23.12.2016 was not issued and executed, would heavens have fallen. More particularly, in the light of admitted facts and circumstances that before issuing said provincialisation order of these institutions, posts were not sanctioned or created nor approval from the Finance Department was obtained nor proper assessment/ examination of financial burden and other relevant aspects were seen and such approval was given on the basis of list provided by these institutions. Knowing fully well about the legal position that in absence of any sanctioned post with the necessary approval from the Finance Department, payment of salary cannot be made. The said Government Order dated 23.12.2016 appears to be lucrative offer to the persons at large, who are beneficiary of that Government Order, for getting benefit in the forthcoming election. Therefore, the aforesaid reasons are sufficient to dismiss the writ petitions.

53. Besides, the Absorption Rules, 1992 so cited by the learned counsel for the petitioners would not cover the issue in hand inasmuch as that Absorption Rules, 1992 do not prescribe the manner of provincialisation and it has nothing to do with the provincialisation of the institutions. Such Rules were promulgated with a view to absorb the services of teaching staff against newly created post in the provincialised institutions. In the bunch of the writ petitions, besides teaching staff so many non-teaching staff i.e. Class-III and Class-IV employees have been impleaded as petitioners and the Absorption Rules, 1992 do not cover the service conditions of Class-III and Class-IV employees in any manner whatsoever. Not only the above, said Rules would be applicable on the teaching staff working in the provincialised institute before its provincialisation and also working against the duly sanctioned post after its provincialisation. It has nothing to do with the process of provincialisation of an institute. As a matter of fact, Absorption Rules, 1992 would be applicable on teaching staff, not on non-teaching staff and those teaching staff should be serving in the provincialised institution before its provincialisation serving on duly sanctioned post. Therefore, the ground taken in the impugned order dated 13.2.2018 appears to be valid one and the impugned order dated 13.2.2018 does not require any interference from this Court.

54. Considering the argument of Sri Chandra regarding applicability of Article 21-A of the Constitution in the present case, it is very much clear that Article 21-A of the Constitution mandates that the State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine. This constitutional provision itself provides that while following the said provision, the legal requirement would be adhere to by the State Government concerned. In the case in

hand, there is no such complaint that provision of Article 21-A of the Constitution is being flouted vide order dated 13.2.2018. Even no specific prayer in any writ petition has been made that the Government Order dated 13.2.2018 be quashed being violative of Article 21-A of the Constitution. As per admitted fact by the petitioners themselves that they are imparting education in those institutions even today. Therefore, considering the rival submissions and provision of law, I am of the considered opinion that the argument placed by Sri Chandra regarding applicability of Article 21-A of the Constitution in the present case is misplaced argument as it would not apply in the case in hand.

55. This is trite law that the role model for governance and decision taken thereof should manifest equity, fair play and justice. The cardinal principle of governance in a civilized society based on rule of law not only has to base on transparency but must create an impression that the decision-making was motivated on the consideration of probity. The principle of governance has to be tested on the touchstone of justice, equity and fair play and if the decision is not based on justice, equity and fair play and has taken into consideration other matters, the said decision may look legitimate but as a matter of fact, the reasons are not based on values but to achieve popular accolade, that decision cannot be allowed to operate. In the light of what has been said above, the Government Order dated 23.12.2016 does not appear to have been issued in a fair manner so it may not be said to be a justiciable Government Order. In fact, 'justice' means nothing more and nothing less than being fair. Therefore, the said Government Order dated 23.12.2016 has been rightly withdrawn by the impugned Government Order dated 13.2.2018.

56. In the instant case, since apparent haste has been shown in issuing Government Order dated 23.12.2016 provincialising seven educational institutions just before few days from enforcement of model code of conduct for holding Assembly Election, 2017 and without conducting the required exercise, as discussed above, such exercise of the authorities may not be appreciated. Further, the approval of the aforesaid exercise of provincialisation was given by the then Chief Minister either on the last date of election i.e. 8.3.2017 or after counting of votes on 14.3.2017 (date of counting was 11.3.2017). No exceptional circumstance or urgency has been shown by the then Government/authority in issuing such Government Order on 23.12.2016, therefore, the purpose of issuing said Government Order comes under the cloud of suspicion as it appears, prima facie, to be a lucrative Government Order extending the benefits to certain persons/ institutions for forthcoming election.

57. To me, in order to test the authenticity and relevance issuing the Government Order dated 23.12.2016 where it is alleged by the State Government that the required exercise has not been carried out, as considered above, before issuing that Government Order it is necessary to ascertain its motive, as to whether it is purposeful within four corners of the law or it has got some ulterior motive. I am of the considered opinion and it is also a trite law that what cannot be done directly, it is not permissible to be done obliquely. In other words, whatever is prohibited by the law to be done, cannot legally be effected by an indirect manner. The authority cannot be

permitted to evade a law by 'shift or contrivance'.

58. In view of the factual and legal matrix of the issue, there is no specific Act, Rule or statutory backing for passing the provincialisation order as it could have been issued in an exceptional circumstance but following the norms. Further, the Absorption Rules, 1992 are not applicable in the case in hand, therefore, the petitioners are not having any statutory or legal right in their favour to get their institutions provincialised and in absence of any legal or statutory right, the petitioners are not entitled to get any relief under Article 226 of the Constitution of India. Besides, in absence of the posts having been sanctioned with necessary financial approval from the Finance Department, direction for payment of salary to the petitioners may not be issued. Since the required exercise, as has been considered above, has not been carried out before issuing the Government Order dated 23.12.2016, specific exigency in issuing this Government Order has not been demonstrated and the conditions mentioned in the Government Order dated 23.12.2016 have also not been followed in its letter and spirit so no direction for executing the Government Order dated 23.12.2016 may be issued in the ends of justice. It clearly appears that the conscious decision has been taken by the competent authority with the Cabinet approval withdrawing Government Order dated 23.12.2016 by issuing subsequent Government Order dated 13.2.2018, therefore no interference would be required in the impugned Government Order dated 13.2.2018.

59. Accordingly, in view of the facts, circumstances and reasons considered herein above, I do not find any infirmity or illegality in the impugned order dated 13.02.2018 passed by the State Government, which is contained in Annexure No.1 to the writ petitions. Therefore, all the writ petitions are **dismisse**d being devoid of merit and interim orders stand vacated. Consequences to follow.

60. No order as to costs.

(2021)06ILR A601
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.06.2021

BEFORE

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

Writ-A No. 38695 of 2015

Vijay Shankar Tripathi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Birendra Singh, Sri Rajnish Pandey, Sri Virendra Singh, Sri Hareram Tripathi

Counsel for the Respondents:
C.S.C., Sri Ayank Mishra, Dr. S.K. Yadav, Sri Pranjal Mehrotra, Sri Rajendra Kumar Mishra

A. Labour Law – Pension - Uttar Pradesh Industrial Disputes Act, 1947 - Section 4-F, 4-K, 6-N, 6-P - Statutory rules of statutory bodies bind both the statutory body and the members of the general public, including their employees. But in the present case, rights of the petitioner flow from a concluded and final award of the Labour Court passed in an adjudication case between the petitioner and the predecessor of the Company. The award required the petitioner to be reinstated on the old terms and conditions of his service, granting him the benefit of continuity in service. He was also required to be paid back-wages, albeit calculated on daily basis. (Para 40)

The petitioner's appointment by the Company is no fresh appointment under them of any kind. It is adjustment of the petitioner's rights in their establishment as an employee of the erstwhile KESA, that he has won on adjudication in an industrial dispute. Therefore, the petitioner's appointment in the Company's establishment is no more than an adjustment made by dint of the Labour Court award, based on the long service rendered by the petitioner with the KESA, found to be illegally terminated, as modified by the settlement agreement dated 07.11.2001. (Para 45)

B. Petitioner has right to receive pension and gratuity in terms of settlement agreement/letter of absorption - A perusal of the letter of appointment clearly traces the petitioner's right to the award of the Labour Court dated 18.01.1996, as subjected to adjustment on compromise between parties, in terms of the settlement agreement dated 07.11.2001.

The award of the Labour Court, giving rise to the agreement passed against the predecessor KESA, or still more, the letter of absorption/adjustment issued to the petitioner dated 08.11.2001, expressly preserve for the petitioner the right to receive pension and gratuity. All this is so because the petitioner is to be regarded and ever to be so regarded as an employee, who has come to the Company's establishment from the establishment of their predecessor KESA, where there was provision for payment of both pension and gratuity, post retirement to their employees. In these circumstances, it can hardly be gainsaid that the Company, who on their establishment, do not have provision for payment of pension or gratuity to retired employees, are not bound by the settlement agreement dated 07.11.2001. (Para 47)

C. It is, not a case, where the petitioner is pleading or asserting a contractual right that conflicts with a statute, a statutory rule or a non-statutory regulation, governing post retiral benefits, admissible to employees of the Company. He is asserting his rights under a concluded award of the Labour Court to the extent, it has been modified and mutually adjusted between parties through the terms of a contract incorporated in the settlement agreement. There is no statutory rule which empowers the company to vary or change conditions of service of employees of former KESA upon the Company, stepping into the shoes of the KESA. Therefore, the employees of the erstwhile KESA, who were entitled to pension and gratuity in their service, would continue to be entitled upon absorption in the Company's service.

It is for the said reason that the Company with open eyes accepted for a term in the settlement agreement that the petitioner would forego all his monetary benefits relating to the period of service with the KESA that he was entitled to under the award, except his pension and gratuity reckoned w.e.f. 1.5.1982. For the same reason, the letter of absorption/adjustment issued by the Company to the petitioner dated 8.11.2001, reserves the petitioner's right to receive both pension and gratuity. (Para 48)

D. Constitution of India: Articles 14, 19, 21 - Fundamental rights to a fair treatment by the State – The respondents are a State instrumentality and are required to be fair in their dealings with citizens in general, and their employees in particular. The stand of the Company in securing a complete discharge of the petitioner's rights under the award passed by the Labour Court, that has become final through a settlement agreement recorded before the Conciliation Officer, and then turning around to deny one of the most valuable terms of that settlement favouring the petitioner, by pleading a rule regarding non-provision of pension and gratuity in the Company's establishment, is patently unfair and shockingly unconscionable; it is almost dishonest and mala fide. In fact, this stand of the Company, if upheld, would lead to a defeat of the petitioner's fundamental rights to a fair treatment by the State, guaranteed by Articles 14, 19 and 21 of the Constitution. It would be permitting the State to act very unfairly vis-a-vis. their employee and a citizen. (Para 49)

Writ petition allowed. (E-2)

Precedent distinguished:

1. PEPSU RTC, Patiala Vs Mangal Singh & ors., (2011) 11 SCC 702 (Para 18, 38, 39)

Present petition assails order dated 19.04.2014, which refuses grant of retirement pension, passed by Managing Director, Kanpur Electric Supply Company Limited, issued by Deputy Chief Accounts Officer of Company.

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

1. This writ petition puts in issue a decision of the Kanpur Electric Supply Company Limited (for short "the Company"), respondent no.2 and communicated vide order dated 19.04.2014, issued by the Deputy Chief Accounts Officer of the Company, refusing to grant retirement pension to the petitioner.

2. Heard Mr. Hareram Tripathi, Advocate holding brief of Mr. Rajnish Pandey, learned Counsel for the petitioner, Mr. Rajendra Kumar Mishra, learned Counsel appearing for respondent nos. 2, 3 and 4, and Dr. Amar Nath Singh, learned Standing Counsel appearing on behalf of the State.

3. In this writ petition, parties have exchanged affidavits at the admission stage, much before the petition was formally admitted to hearing on 07.12.2020. It was, on that day, heard and judgment reserved. However, on 07.12.2020, Mr. Pranjal Mehrotra, learned Counsel for the Company and its various officers, was not present. It was, therefore, considered expedient to post the matter for further hearing. It came up again on 16.12.2020, when Mr. Rajendra Kumar Mishra, learned Advocate appeared on behalf of the Company and their various officers, that is to say, respondent nos.2, 3 and 4. Learned Counsel appearing for all parties were heard on that day and judgment was reserved.

4. The dispute involved in this writ petition is a sequel to an award dated 18.01.1996, passed by the Presiding Officer, Labour Court (IV), U.P., Kanpur (published on 18.04.1996) in Adjudication Case no.3 of 1988 between the predecessors of the Company, that is to say, M/s. Kanpur Electric Supply Administration, who were the employers and the petitioner, their workman. The award became final between parties, in course of proceedings, the details whereof would be mentioned later in this judgment. The proceedings for execution of the award of the Labour Court led to a settlement agreement being recorded before the Conciliation Officer (Deputy Labour Commissioner, U.P., Kanpur Region, Kanpur) dated 07.11.2001, in terms of which, the petitioner claims a right to receive retirement pension. By the decision impugned, the Company have denied the petitioner's right aforesaid, founded on the Labour Court's award and the ensuing settlement agreement recorded before the Conciliation Officer. It is the aforesaid claim of the petitioner and its repudiation by the Company, which has given rise to this writ petition.

5. The petitioner was appointed as a Clerk on daily-wages on 10.11.1980 with the Kanpur Electric Supply Administration (for short "KESA"), a part of the establishment of the late U.P. State Electricity Board. The erstwhile U.P. State Electricity Board (for short "the Board") was wound up and reconstituted into three companies, one of these being the U.P. Power Corporation Limited (for short "UPPCL"). On 14.01.2000, the KESA,

upon dissolution of the Board and its part reconstitution into the UPPCL, was reconstituted as the Kanpur Electric Supply Company Limited (already introduced hereinbefore, for the sake of brevity, as "the Company"). During the KESA days, the petitioner was granted extension as a daily-wage clerk from time to time. There are two extension orders dated 01.01.1981 and 31.12.1981, annexed to the writ petition collectively as Annexure no.2. But, all that does not appear to be very material, considering the fact that the petitioner's tenure and terms of employment as well as dispensation of services at a certain point of time by the KESA has already been through the process of industrial adjudication, culminating in an award of the Labour Court, details whereof would be mentioned later. In substance, the petitioner remained a daily-wage clerk for six years with the KESA and his services were terminated by an oral order dated 31.12.1986, again by the KESA. The petitioner dubbed this sudden termination of his services by the KESA as illegal, arbitrary, and amongst others, one made in violation of the provisions of the Uttar Pradesh Industrial Disputes Act, 1947 (for short "the Act of 1947"). He raised an industrial dispute against the KESA, which, after reference under Section 4-K of the Act of 1947, came to be registered on the file of the Presiding Officer, Labour Court (IV), U.P., Kanpur as Adjudication Case no.3 of 1988. The reference made to the Labour Court under Section 4-K of the Act of 1947 on 06.01.1988, reads to the following effect (translated into English from Hindi vernacular):

"Whether the act of the employers terminating the services of their workman, Vijay Shankar Tripathi, a daily-wage clerk w.e.f. 31.12.1986 is proper and/or lawful? If not, to what benefit/relief is the workman concerned entitled and in what terms?

6. The industrial dispute was tried by the Labour Court and by an award dated 09.04.1996 (published on 18.04.1996), it was ordered that the workman (the petitioner) be reinstated in service by the employers (KESA, now represented by the Company, their successor) on his old terms and conditions of service, together with continuity of service, without any break. It was further awarded that for the period of forced unemployment, the employers would be liable to pay the petitioner wages worked out on a daily basis. Costs in the sum of Rs.300/- were also ordered.

7. The award aforesaid of the Labour Court was challenged by the Board through Civil Misc. Writ Petition No. 19130 of 1996 before this Court. It was pending this writ petition that there was complete reorganization of the existing power distribution bodies in the State. This was brought about by the State Government by means of the U.P. Electricity Reforms Act, 1999. The last mentioned Act dissolved the Board and vested all its properties, rights, interests and liabilities, as they existed, in three different successor Corporations, to wit, the Uttar Pradesh State Power Generation Corporation Limited, the Uttar Pradesh Hydro Electric Power Corporation Limited and the Uttar Pradesh Power Corporation Limited. Along with this transfer of assets, rights and liabilities from the erstwhile Board to the three Corporations, the services of the employees of the Board were transferred to the three successor Corporations on 'as is where is' basis. It was further provided under the scheme for transfer of services of employees of the Board to the successor

Corporations that such employees, whose seniority was not required to be determined at the State level, would get absorbed in the services of the Corporation, where they were employed.

8. It appears that by a gazette notification dated 15.01.2001, the State Government notified the Company as a subsidiary company of the UPPCL to succeed the KESA. In substance, therefore, upon dissolution of the erstwhile Board, its rights and liabilities, insofar as the petitioner was concerned, or so to speak, the KESA was concerned, were vested in the UPPCL. There was thus effected a transfer of all the functions, rights and liabilities of the former KESA to the Company. While all this reorganization in the set up of the Company or the employers of the petitioner took place, the writ petition preferred by the former KESA from the award of the Labour Court dated 18.01.1996 came to be dismissed as infructuous by this Court *vide* order dated 16.05.2000. It has been asserted for a fact that the aforesaid order dismissing the KESA's writ petition was never applied recall of or the writ petition got restored by the Company as the KESA's successor. As such, the order of this Court dated 16.05.2000, dismissing Civil Misc. Writ Petition 19130 of 1996 became final, and with it, the award of the Labour Court dated 18.01.1996.

9. The Company, faced with the prospects of execution of the award dated 18.01.1996 passed against its predecessor KESA, entered into a settlement agreement dated 07.11.2001 before the Conciliation Officer (Deputy Labour Commissioner, Uttar Pradesh, Kanpur Region, Kanpur), duly recorded under Section 4-F of the Act of 1947 read with Rule 5 (1) of the Industrial Disputes Rules, 1957. It is pointed out by the learned Counsel for the petitioner, Mr. Hareram Tripathi, that this settlement agreement was arrived at by the Company to ward off execution of the award passed by the Labour Court, regarding which, execution proceedings had been instituted by the petitioner vide Misc. Case No. 28 of 2001. It is emphasized by Mr. Tripathi that Paragraph No. 8 of the settlement agreement shows that the liquidated sum of back-wages, claimed in the execution case by the petitioner, was a sum of Rs.9,28,473/-. The terms of the settlement agreement, according to the learned Counsel for the petitioner, show that broadly speaking, the petitioner agreed to be adjusted on the post of a daily-wage clerk, that he formerly held, but placed in the regular pay scale of Rs.4200-100-6400/- w.e.f. 01.10.2001, in lieu of forgoing voluntarily all his claims to back-wages.

10. It is further pointed out by the learned Counsel for the petitioner that vide paragraph no. 5 of the settlement agreement, it was covenanted that the petitioner would be entitled to continuity of service w.e.f. 01.05.1982, for the purpose of pension and gratuity alone, and that for the aforesaid period of time, he would not be entitled to any other benefit. To the same end, learned Counsel for the petitioner has drawn attention of the Court to paragraph no. 7 of the settlement agreement, which covenants that all other entitlements of the petitioner, attached to the post of daily-wage clerk in the pay scale of Rs.4200-100-6400 and other admissible allowances thereon, would be determinable w.e.f. 01.10.2001, but no other benefit for the earlier period of his employment in terms of the award would be payable, except pension and gratuity. It

was also covenanted that the settlement agreement would be regarded as full and complete satisfaction of the award passed in Adjudication Case No. 3 of 1988.

11. It is next submitted by the learned Counsel for the petitioner that it was in compliance with the award of the Labour Court dated 18.01.1996 passed in Adjudication Case No. 3 of 1988 and the settlement agreement dated 07.11.2001, entered into between parties in proceedings arising from the award, that a letter of appointment, described as adjustment on the post of a daily-wage clerk in the pay scale of Rs.4200-100-6400/-, was issued by the Company in favour of the petitioner, subject to three conditions, largely giving effect to the settlement agreement. It is urged that the first condition clearly indicates that all entitlements of the petitioner attached to the post of a daily-wage clerk in the pay scale of Rs.4200-100-6400/- would be determinable w.e.f. 01.10.2001, together with other benefits payable, according to the award, but except for pension and gratuity, no other benefits would be payable for the former period of employment. The submission of the learned Counsel for the petitioner, therefore, is that the conjoint effect of the award, the settlement and the letter of appointment issued to the petitioner, is that he is not entitled to claim back-wages in terms of the award in consideration of his adjustment now made by the Company on the post of daily-wage clerk in the pay scale of Rs.4200-100-6400/-, except the petitioner's entitlement to pension and gratuity, determinable from 01.05.1982, the former period of his employment.

12. The petitioner retired from service on attaining the age of superannuation on 12.07.2012. He was admittedly paid a sum of Rs.2,29,478/- vide Cheque No. 50914 dated 31.10.2012 towards his General Provident Fund. The petitioner was, however, neither paid gratuity nor pension. He waited for a period of about one year before he submitted a representation dated 05.12.2012 to the Company, represented by its Managing Director, asking for payment of his pension and gratuity. Attention of the Court has been drawn to certain intra-departmental correspondence, being letters dated 28.09.2012 and 29.08.2013, addressed by the Chief Engineer to the Director (Personnel & Administration) of the Company, requesting the latter to seek legal opinion about the tenability of the petitioner's claim to pension and gratuity.

13. It appears that no decision was taken by the Company regarding the petitioner's claim to payment of gratuity and pension for a considerable period of time. The petitioner, therefore, approached this Court, by means of Writ - A No.57607 of 2014, with a prayer that the respondents may be directed to pay his gratuity and pension. The aforesaid writ petition was disposed of in terms of a judgment and order dated 30.10.2014. Learned Counsel has drawn this Court's attention to a copy of the said order passed by this Court, the operative portion whereof reads :

"In view thereof, the writ petition is being disposed of with a direction to the Managing Director of Kanpur Electricity Supply Limited to consider request of the petitioner for grant of pensionary benefits and compute the pension at the earliest and order on release of pension of the petitioner shall be passed expeditiously preferably, within one month from the date of production of a certified copy of this order before him."

14. A copy of the said judgment was lodged with the Managing Director of the

Company by the petitioner, along with a covering letter dated 30.01.2015. It is in purported compliance with the aforesaid order passed by this Court in Writ - A No.57607 of 2014 that the Managing Director of the Company has taken a decision to reject the petitioner's claim, both regarding pension and gratuity, which has been communicated by means of the impugned order dated 19.12.2014.

15. The earliest return that was filed on behalf of the Company is one dated 13.04.2018, though this Court ordered the Company to file a counter affidavit pending admission on 15.07.2015. The substance of the stand, discernible from the counter affidavit filed on behalf of the Company, is that they do not disown the fact that the petitioner was earlier a daily-wage employee of the KESA; the fact that the Company is a successor of the KESA; the fact that an award was passed by the Labour Court against the KESA in Adjudication Case No. 3 of 1988; the fact that the Company in place of the KESA entered into a settlement agreement before the Conciliation Officer with the petitioner, in terms whereof the award of the Labour Court stood satisfied; and also the fact that the writ petition preferred by the KESA against the award of the Labour Court was dismissed as infructuous on 16.05.2000, whereagainst no steps have been taken by the Company. The petitioner's claim is, however, resisted by the Company, primarily on foot of the reasoning that the petitioner was appointed afresh, in lieu of his former services with the KESA, and to adjust rights under the award vide letter of appointment dated 01.10.2001, and further that all rights of the petitioner are traceable to 14.01.2000, that is to say, the date of incorporation of the Company. It is urged that none of the rights of the petitioner are traceable or determinable with reference to the period of his service rendered with the KESA.

16. It is also the Company's stand that an Office Memorandum No. 1915 dated 06.06.2003, issued by the UPPCL, of which the Company is a subsidiary, does not provide for a pension scheme. Instead, it provides for a Contributory Provident Fund Scheme. It is further the Company's stand that it was open to the petitioner to fill up the necessary form under the CPF Scheme and secure allotment of a CPF number, which he did not do. Instead, the petitioner secured a General Provident Fund Account number, which was cancelled by the Senior Accounts Officer, Uttar Pradesh State Power Sector Employees Trust, Lucknow vide Letter No. 1804 dated 10.10.2012 w.e.f. the date of allotment of the account number. These averments find place in paragraph no. 17 of the counter affidavit, where it is also said that the petitioner deposited money under the GPF Scheme, which, after cancellation of that account, was refunded to him along with interest by Cheque No. 50914 dated 31.10.2012, worth Rs.2,29,478/-.

17. The thrust of the Company's submission is that the settlement agreement entered into before the Conciliation Officer on 07.11.2001, to ensure compliance of the award passed by the Labour Court, cannot be enforced for a term therein, which is against the provisions of law. Dilating on this stand, set out in paragraph no. 11 of the counter affidavit, it is urged on behalf of the Company by Mr. Mishra that the petitioner has been retained afresh by the Company w.e.f. 01.10.2001. The Company, in terms of Office Memorandum No. 1915 dated 06.06.2003 issued by the UPPCL, does not have a pension scheme in force. It

only has a Contributory Provident Fund Scheme. Therefore, for employees appointed on or after 01.10.2001 to the service of the Company, no pension can be paid under the law. The terms, therefore, carried in paragraph nos. 5 and 7 of the settlement agreement dated 07.11.2001, where the Company has covenanted to pay pension and gratuity to the petitioner, in lieu of his giving up his claim to back-wages under the award, is a covenant that is contrary to the law in force. Therefore, it cannot be given effect to.

18. In support of his submission, learned Counsel appearing on behalf of the Company/respondent nos. 2, 3 and 4, has relied upon a decision of the Supreme Court in **PEPSU RTC, Patiala v. Mangal Singh and others**1. Learned Counsel has emphasized the holding in **PEPSU RTC**, where it has been observed:

"29. It is well-settled law that the regulations made under the statute laying down the terms and conditions of service of the employees, including the grant of retirement benefits, have the force of law. The regulations validly made under the statutory powers are binding and effective as the enactment of the competent legislature. The statutory bodies as well as general public are bound to comply with the terms and conditions laid down in the regulations as a legal compulsion. Any action or order in breach of the terms and conditions of the regulations shall amount to violation of the regulations which are in the nature of statutory provisions and shall render such action or order illegal and invalid."

19. In the rejoinder affidavit, that has been filed by the petitioner in answer to the counter affidavit dated 03.04.2018, the terms of the settlement agreement recorded inter partes have been pleaded to, to show that pension and gratuity are determinable in terms of the award, calculating the period of service rendered earlier under the KESA, with continuity for the limited purpose of entitlement to pension and gratuity. The other benefits, particularly back-wages, have been given up by the petitioner in consideration of his adjustment by the Company against the same post that he was holding w.e.f. 01.10.2001. It is emphasized that the petitioner's appointment is not a fresh appointment under the Company, but a reinstatement on account of the award rendered by the Labour Court in his favour, where an adjustment of rights has been arrived at before the Conciliation Officer, in terms of the settlement agreement dated 07.11.2001. Thus, the stand in the rejoinder appears to be that the petitioner cannot be deprived of his rights flowing from the settlement agreement, which, in turn, derives its force from the award of the Labour Court, that together conclude the rights of parties about everything, including pension and gratuity.

20. It is also particularly pleaded in the rejoinder affidavit that one Ramu Bajpayee, a daily-wage clerk under the KESA, whose services were terminated like the petitioner's, had approached the Labour Court, challenging the dispensation of his services. The Labour Court had passed an award in favour of Ramu Bajpayee, where also, a settlement agreement like the one in the petitioner's case, was entered into between Ramu Bajpayee and the Company. It has been pleaded that in Bajpayee's case, a pension payment order dated 29.06.2016 has been issued, in compliance with the office order dated 26.05.2016, treating Bajpayee's

services to be those continuing from the erstwhile KESA, for the limited purpose of payment of pension and gratuity, and to abide by the terms of the settlement agreement entered into between the Company and Bajpayee. It is urged on behalf of the petitioner that Bajpayee being similarly circumstanced as the petitioner, denial of pension and gratuity to him is discriminatory.

21. A further counter affidavit dated 06.08.2018 has been filed on behalf of the Company, where the case of the petitioner and Ramu Bajpayee has been attempted to be distinguished, by pleading the differences, shown in tabular form, in paragraph no. 4 of the counter affidavit under reference. The table there is extracted below:

श्री विजय शंकर त्रिपाठी	श्री रामू बाजपेयी
कार्यालय ज्ञाप सं0 एल0सी0-4 अभि0/3/88/849 दि0 08.11.2001 द्वारा श्री विजय शंकर त्रिपाठी को 01.10.2001 से दैनिक श्रेणी लिपिक वेतनमान रू0 4200-100-6400 के पद पर निम्न सेवा शर्तो के आधीन समायोजित किया गया था। 1. श्री विजय शंकर त्रिपाठी पुत्र श्री भगवती प्रसाद त्रिपाठी को दिनांक 01.10.2001 से दैनिक श्रेणी लिपिक का पद व वेतनमान रू0 4200-100-6400 व उस पर अनुमन्य अन्य हितलाभ देय होंगे किन्तु एवार्ड के अनुसार पेंशन व ग्रेच्युटी को छोड़कर पूर्व की अवधि को अन्य किसी प्रकार का हितलाभ अनुमन्य नहीं होगा। 2 श्री विजय शंकर त्रिपाठी को कम्प्यूटर को ज्ञान अर्जित करने तथा टंकन परीक्षा उत्तीर्ण करने की तिथि से अनुमोदित दैनिक श्रेणी लिपिक पद के हितलाभ (जैसे वरिष्ठता/ पदोन्नति व अन्य) अनुमन्य होंगे व वार्षिक वेतन वृद्धि, समयबद्ध वेतनमान की गणना 01.10.2001 की तिथि से अनुमन्य होगी 3. अभिनिर्णय वाद सं0-3/88 के अर्न्तगत मा0 श्रम न्यायालय-द्वितीय, उ0प्र0, कानपुर के समक्ष रु0 9,20,473.00 की संगणना को जो विविध वाद श्री त्रिपाठी द्वारा दाखिल किया गया है वह समाप्त माना जायेगा।	कार्यालय ज्ञाप सं0 एल0सी0-3 (ए-173/93/ डब्लूपी/3639/ 98) /552 दि0 26.04.2005 द्वारा श्री रामू बाजपेयी को दिनांक 01.01.1979 से रू0 365-585, समय-समय पर संशोधित एवं 01.01.1996 से पुर्नरीक्षित वेतनमान रू0 4200-6400 पर दैनिक श्रेणी लिपिक के पद पर निम्न सेवा शर्तो के आधीन सेवा में पुर्नस्थापित किया गया था। 1. श्री रामू बाजपेयी को दिनांक 01.01.1979 से सेवा में तारतम्यता दी जायेगी। 2. श्री रामू बाजपेयी की सेवा में पुर्नस्थापना के फलस्वरूप दिनांक 01.01.1979 से 31.03.2005 तक का किसी भी प्रकार का भुगतान देय नहीं होगा और न ही श्री बाजपेयी द्वारा पूर्व में वसूलयावी के माध्यम से प्राप्त भुगतान का ही समायोजन किया जायेगा। 3. श्री रामू बाजपेयी को दिनांक 01.04.2005 से वेतन एवं भत्तों को भुगतान किया जायेगा।

22. A supplementary rejoinder affidavit in answer to the counter affidavit dated 06.08.2018 has been filed, being one dated 28.08.2018. In answer thereto, various terms of the settlement agreement have further been pleaded in paragraph no. 5 of the supplementary rejoinder affidavit. Paragraph nos. 11 and 12 of the award, that have led to the settlement agreement, have been pleaded to point out that the Labour Court had determined that the services of the petitioner under the erstwhile KESA were not for a limited period of time, but regular, looking to the period of his retention in service. His termination from service was held to be illegal, particularly, as juniors had been retained. The award had granted reinstatement on his old

service conditions with continuity and back-wages for the entire period that he was kept out of employment.

23. I have perused the record and keenly considered the submissions made on behalf of both parties.

24. It is common ground between parties that the petitioner was a daily-wage clerk with the erstwhile KESA, of which the Company are successors. He was a daily-wage clerk from 10.11.1980 until 31.12.1986. His services were terminated on 13.12.1986 by the KESA. This termination was the subject matter of an industrial dispute, that was raised at the instance of the petitioner and referred to the adjudication of the Labour Court. The Labour Court passed an award dated 09.04.1996 (published on 18.04.1996), whereby the petitioner was ordered to be reinstated in service by the KESA on the old terms and conditions of service, with benefit of continuity. Back-wages for the period that the petitioner remained out of employment on account of termination of his services were also ordered to be paid to the petitioner, albeit worked out on a daily basis. A perusal of the award rendered by the Labour Court shows that the services of the petitioner were not held to be temporary or for a time bound basis, because he was retained in service for a long number of years and work remained available after his termination. It was also held that the petitioner's services were illegally terminated as juniors were permitted to continue. Admittedly, this award of the Labour Court had become final.

25. The findings returned by the Labour Court in the award show that the services rendered by the petitioner with the Company's predecessors, that is to say, the KESA, have not been held to be temporary or for a limited period of time. A fortiori, the services of the petitioner with the KESA have been held to be regular and permanent in character. It is on the foot of those findings that the Labour Court held the termination of his services illegal, particularly, finding it to be a case where Section 6-P of the Act of 1947 had been violated. This Court must remark that in the award made by the Labour Court, back-wages have been awarded, worked out on a daily basis, while the nature of the petitioner's retention in service has been found to be permanent and not for a limited period of time.

26. The submission of the learned Counsel for the Company that the Labour Court had held the petitioner to be a daily-wager and, therefore, ordered his back-wages to be reckoned on a daily basis, is not tenable. The reason is that the Labour Court directed reckoning of wages on a daily basis, because that is how the petitioner was being remunerated, before his services were unlawfully terminated. But, this does not lead to the inference that the Labour Court held him to be a daily-wager or a workman engaged for some period of time, to meet the exigencies of work. The Labour Court, being a Court of referred jurisdiction, could not grant the petitioner the benefit of regular wages, as that was not the reference made to it. The reference made to the Labour Court was whether the services of the petitioner were unlawfully terminated, and the Labour Court could not travel beyond the terms of the order of reference and questions incidental to it. Since the validity of the KESA's action in terminating the services of the petitioner was referred for a decision to the Labour Court, it was within the legitimate domain of the Labour Court to

determine the nature of the petitioner's employment and tenure with the KESA.

27. A perusal of the award also shows that after considering all evidence on record, it was held by the Labour Court that despite there being a requirement of daily-wage clerks, termination of the petitioner's services was both improper and illegal. It was also held that looking to the long number of years of service, the petitioner's tenure cannot be held to be temporary or for a limited duration. It was in the context of these findings that the Labour Court reinstated the petitioner on the old conditions of his service, with continuity. Read as a whole from any angle, the award held the petitioner to be a regular and permanent workman of the KESA. Since this award has become final between parties, it cannot now be assailed collaterally by the Company, who are KESA's successors in the present writ petition.

28. It appears that faced with proceedings for execution of the award vide Misc. Case no.28 of 2001, where the petitioner put forward a claim to back-wages, liquidated in the sum of Rs. 9,28,473/-, the Company entered into a settlement agreement before the Conciliation Officer/ Deputy Labour Commissioner, U.P., Kanpur in proceedings under Section 4-F of the Act of 1947. It is imperative to refer to the settlement recorded before the Conciliation Officer inter partes on 07.11.2001, for every word of it. It reads thus:

"प्रपत्र - I
(धारा 4 एफ एवं रुल 5 (1))
समझौते का प्रारुप
पक्षों के नाम व पते :-

सेवायोजक पक्षः - (1) मे0 कानपुर विद्युत आपूर्ति कम्पनी लि0,
14/71, सिविल लाइन्स,
कानपुर।
श्रमिकः - (2) श्री विजय शंकर त्रिपाठी,
पुत्र श्री भगवती प्रसाद त्रिपाठी,
86/14, डिप्टी का पड़ाव,
कानपुर।
सेवायोजक की ओर सेः - श्री ओ०पी० मिश्रा, वरिष्ठ कर्मिक अधिकारी,
श्रमिक की ओर सेः - श्री विजय शंकर त्रिपाठी (स्वयं श्रमिक)
द्वारा: श्री राम मनोरथ त्रिपाठी - कार्यवाहक अध्यक्ष कानपुर विजली मजदूर सभा 96/10 महात्मा गांधी मार्ग, कानपुर।

-:: विवाद का संक्षिप्त विवरण ::-

श्री विजय शंकर त्रिपाठी पुत्र श्री भगवती प्रसाद त्रिपाठी के डेली रेटेड क्लर्क के पद से दिनांक 31.12.86 से सेवायें समाप्त किए जाने के विरुद्ध माननीय पीठासीन अधिकारी, श्रम न्यायालय-4, उ0प्र0 कानपुर में उठउस गए अभिनिर्णय वाद सं0 03/88 में वादी के पक्ष में पुरानी सेवा शर्तों व अखण्डता के साथ सेवा में पुर्नस्थापित करने के हुए एवार्ड दिनांक 18.01.96 (इस अभिनिर्णय वाद के विरुद्ध माननीय उच्च न्यायालय, इलाहाबाद में दाखिल रिट याचिका संख्या - 19130/96 के परिप्रेक्ष में) के क्रियान्वयन स्वरुप उभय पक्षों में सौहार्दपूर्ण वातावरण में निम्नलिखित शर्तों पर आपसी समझौता सम्पन्न हुआ !

-:: समझौते की शर्ते :-

1. यह कि सेवायोजक वाद के दाखिल होने के समय कानपुर विद्युत सम्पूर्ति प्रशासन था जो कि वर्तमान में कानपुर विद्युत आपूर्ति कम्पनी हो गई है।

2. यह कि वादी श्री विजय शंकर त्रिपाठी पुत्र श्री भगवती प्रसाद त्रिपाठी उक्त अभिनिर्णय वाद सं0 3/88 में हुए एवार्ड के परिप्रेक्ष्य में 01.10.2001 की तिथि से दैनिक श्रेणी लिपिक, वेतनमान रू0 4200-100-6400 का पद प्रदान किए जाने की स्थिति में एवार्ड के अनुसार देय पिछला सभी प्रकार का हितलाभ स्वेच्छा से छोड़ने को तैयार है।

3. यह कि वादी श्री विजय पांकर त्रिपाठी उक्त अभिनिर्णय वाद के परिप्रेक्ष्य में 01.10.2001 की तिथि से दैनिक श्रेणी लिपिक का पदनाम व वेतनमान प्रदान किए जाने की दशा में दैनिक श्रेणी लिपिक के पद के लिए निर्धारित योग्यता जैरो - टंकण एवं कम्प्यूटर का ज्ञान अर्जित करने एवं विभाग द्वारा आयोजित टंकण परीक्षा उत्तीर्ण करने के पश्चात अनुमोदित दैनिक श्रेणी लिपिक के पद पर समायोजित कर दिनांक 01.10.2001 से वरिष्ठता एवं पदोन्नति हितलाभ देय होंगे।

4. यह कि वादी इस बात के लिए स्वेच्छा से तैयार है कि वह पूर्व में हुए अन्य किसी भी डेली रेटेड क्लर्क के समझौते/वाद का उदाहरण लेते हुए भविष्य में किसी भी प्रकार की मांग नहीं उठायेगा।

5. यह कि वादी को दिनांक 01.05.82 से केवल पेंशन एवं ग्रेच्युटी हेतु सेवा में निरन्तरता का लाभ अनुमन्य होगा और इस अवधि का अन्य किसी प्रकार का दूसरा सेवा हितलाभ अनुमन्य नहीं होगा।

6. यह कि सेवायोजक श्री विजय शंकर त्रिपाठी पुत्र श्री भगवती प्रसाद त्रिपाठी को 01.10.2001 की तिथि से दैनिक श्रेणी लिपिक के पद एवं वेतनमान रू0 4200-100-6400 पर समायोजित करने को तैयार है एवं बिन्दु सं0 1, 2, 3, 4 एवं 5 पर सहमत हैं।

7. यह कि सेवायोजकों द्वारा श्री विजय शंकर त्रिपाठी पुत्र श्री भगवती प्रसाद त्रिपाठी को 01.10.2001 की तिथि से दैनिक श्रेणी लिपिक का पद व वेतनमान रू0 4200-100-6400 व उस पर अनुमन्य अन्य हितलाभ देय होगे किन्तु एवार्ड के अनुसार पेंशन व ग्रेच्युटी को छोड़ कर पूर्व की अवधि का अन्य किसी प्रकार का हितलाभ अनुमन्य नहीं होगा और श्री त्रिपाठी को कम्प्यूटर का ज्ञान अर्जित करने तथा टंकण परीक्षा उत्तीर्ण करने की तिथि से अनुमोदित दैनिक श्रेणी लिपिक पद के हितलाभ (जैसे वरिष्ठता/ पदोन्नति व अन्य) अनुमन्य होने व वार्षिक वेतन वृद्धि, समयबद्ध वेतनमान की गणना 01.10.2001 की तिथि से अनुमन्य होगी।

8. यह कि उक्त अभिनिर्णय वाद सं0 - 3/88 के अनतर्गत माननीय श्रम न्यायालय - द्वितीय, उ0प्र0 कानपुर के समक्ष रू0 9,28,473.00 की संगणना का जो विविध वाद सं0 28/2001 वादी द्वारा दाखिल किया गया है वह समाप्त माना जाएगा और वादी उस पर किसी प्रकार की कार्यवाही नहीं करेगा, अन्यथा की स्थिति में समझोता मान्य नहीं होगा।

9. समझौते के पश्चात वादी एवार्ड के अन्तर्गत पूर्व के किसी भी प्रकार के हितलाभ का अधिकारी नहीं रह जाता है और समझौते से अभिनिर्णय वाद सं0 3/88 का पूर्ण एवं अन्तिम रुप से प्रतिपालन माना जायेगा।

गवाहों के हस्ताक्षर :- पक्षों के हस्ताक्षर :-
ह0 अपठित ह0 अपठित
(ओ0पी0 मिश्रा)
वरिष्ठ कर्मिक अधिकारी
सेवायोजक प्रतिनिधि
ह0 अपठित ह0 अपठित
(राम मनोरथ त्रिपाठी) (विजय शंकर त्रिपाठी)
कानपुर बिजली मजदूर सभा सम्बन्धित श्रमिक
कार्यवाहक अध्यक्ष
श्रमिक प्रतिनिधि
कानपुरः
दिनांक : 7.11.2001
पक्षकारों ने मेरे समक्ष हस्ताक्षर किए -
ह0 अपठित
संराधन अधिकारी (उप श्रमायुक्त)

उ0प्र0 कानपुर क्षेत्र, कानपुर।
Dy. Labour Commissioner, U.P.
Kanpur Region, Kanpur"

(emphasis by Court)

29. A perusal of the settlement agreement shows that it was entered into between parties, taking cognizance of the fact that the petitioner's services were terminated by the KESA on 31.12.1986; the fact that the petitioner had questioned that termination before the Labour Court, which led to Adjudication Case no.3 of 1988 on the file of the Labour Court-IV, U.P., Kanpur; the fact that that the Labour Court passed an award dated 18.01.1996 in favour of the petitioner, reinstating him on his old terms and conditions of service with continuity; and the fact that the parties had entered into the settlement agreement amicably, in order to implement the award of the Labour Court on terms mutually settled. It has to be remarked here that the settlement agreement has, for its origin and foundation, the award of the Labour Court dated 18.01.1996, and all that has been done by means of the settlement agreement is an adjustment of the rights of parties under the award, with both sides giving up something under the award, in consideration of some benefits mutually agreed.

30. A perusal of paragraph no. 2 of the settlement agreement shows that in consideration of the petitioner giving up all his claims to back-wages under the award, he would be placed on the post of a daily-wage clerk in the pay scale of Rs.4200-100-6400/- with the Company w.e.f. 01.10.2001.

31. Paragraph no. 3 of the settlement agreement shows that the petitioner, in the context of the adjudication case being placed on the post of a daily-wage clerk w.e.f. 01.10.2001 in the specified pay scale, would be required to acquire skills of typing and operating computers, and further to pass a typing test. After passing the required typing test, the petitioner would be adjusted against the sanctioned post of a daily wage clerk, where his seniority would be determined w.e.f. 01.10.2001 and the benefit of promotion also worked out on that basis.

32. Paragraph no. 4 of the settlement agreement under reference says that the petitioner voluntarily agrees that he would not raise any other kind of claim, based on the agreement entered into with any other daily rated clerk or another daily rated clerk's case (suited between those parties).

33. Paragraph no. 5 of the settlement agreement specifically stipulates that the petitioner would be entitled to the benefit of pension and gratuity w.e.f. 01.05.1982, and for the said purpose alone, he would be entitled to claim continuity of service, but would not claim any other benefit for the said period based on continuity.

34. Paragraph no. 6 of the agreement specifically says that w.e.f. 01.10.2001, the Company are ready to absorb and adjust the petitioner on the post of a daily rated clerk in the pay scale of Rs.4200-100-6400/-, and further that they are agreeable to the terms carried in paragraph nos. 3, 4 and 5 of the settlement agreement.

35. Paragraph no. 7 of the settlement agreement shows that the petitioner would be entitled to other benefits admissible to a daily rated clerk in the pay scale of Rs.4200-100-6400 w.e.f. 01.10.2001, but for pension and gratuity for any earlier period of time, the petitioner would not be

entitled to other benefits under the award. It is again a term of this paragraph that with effect from the date of acquiring the necessary computer related skills and passing the typing test, the petitioner would be entitled to benefits attached to the post of a daily rated clerk, such as seniority, promotion and others; and further that the annual increment and time scale would be reckoned w.e.f. 01.10.2001.

36. Paragraph no. 8 of the settlement agreement covenants that the petitioner's claim to a sum of Rs.9,28,473/- brought vide Misc. Case no.28 of 2001 against the Company, founded on the award of the Labour Court passed in Adjudication Case no.3 of 1988, would be considered closed and the petitioner would not take any proceedings for enforcement of that claim; if he does, the settlement agreement would not be binding.

37. Paragraph no. 9 of the agreement unequivocally says that the petitioner would not be entitled to any benefit under the award passed in his favour, and the agreement would be considered a full and complete satisfaction of the award passed in Adjudication Case no. 3 of 1988.

38. Learned Counsel for the Company has laid much emphasis on the fact that the petitioner has been appointed or adjusted on the post of a daily rated clerk, in terms of a fresh appointment w.e.f. 01.10.2001. The rules applicable to the Company do not provide for the provision of either gratuity or pension to any retired employee. It provides for a Contributory Provident Fund alone. It is, therefore, urged by the learned Counsel for the petitioner that the terms in the settlement agreement, that confer a right on the petitioner to receive pension and gratuity, reckoning all his services with the Company's predecessor, KESA w.e.f. 01.05.1982 for that purpose, would be in breach of the law applicable to the Company. It is emphasized that if a term in an agreement goes contrary to the law, which includes statutory rules or a non-statutory regime in force in the employers' establishment governing pension etc., a contract to the contrary cannot be enforced. Much emphasis in this connection has been placed by the learned Counsel for the Company on the decision of the Supreme Court in **PEPSU RTC** *(supra*). Learned Counsel for the Company particularly emphasized remarks of their Lordships carried in paragraph no. 29 of the report (extracted hereinabove).

39. A perusal of their Lordships' decision in **PEPSU RTC** shows that it turned on a different principle in the context of completely different facts. The employee there was a driver with the Road Transport Corporation since 07.11.1974 and governed by the service rules of the Corporation, which entitled him to the benefit of a Contributory Provident Fund and gratuity as his post retiral benefits. His services were terminated on 30.06.1982. The termination was challenged before the Labour Court, which repelled the challenge. On a writ petition, the High Court reversed the order of the Labour Court, set aside the termination, directing the employee's reinstatement w.e.f. 18.06.1996. It appears that on 15.06.1992, the Corporation had introduced a pension scheme for its employees, and also framed regulations to govern the scheme. Regulation 4 of the pension scheme required an employee to exercise his/her option, within a period of six months of the date of issue of the regulations, in order to entitle him to the benefit of the scheme. Time to submit that option was extended

until 15.12.1992. Regulation 4 of the Regulations further entitled an employee rejoining service, after leave or suspension, to exercise his option under the scheme, within a period of six months from the date that he rejoined. The employee, before his termination, appears to have submitted a nomination form under the Contributory Provident Fund Scheme. He had not received any retiral benefits upon superannuation, due to pendency of his case in the High Court regarding payment of his back-wages for the period of his absence from service. The employee never submitted an option for the pension scheme, until his retirement.

40. The employee filed a writ petition before the High Court, for a direction to the Corporation to sanction pensionery benefits to him under the pension scheme. The writ petition was allowed by the High Court on ground that the provisions of Regulation 4, that envisaged a period of time to exercise option under the scheme, did not apply to the petitioner, as he was reinstated in service pursuant to orders of the Court. The High Court, therefore, ordered the Corporation to allow the employee to exercise his option under the pension scheme, within six months of the date of their order, and to undertake formalities for payment of pension, within a specified period of time. It was in the aforesaid context and the rights of parties that their Lordships laid down the principle, adumbrated in paragraph no. 29 of the report in **PEPSU RTC**. There can be little quarrel that statutory rules of statutory bodies bind both the statutory body and the members of the general public, including their employees. But, the issue here does not turn on anything of the kind that obtained in **PEPSU RTC** for very obvious reasons. The rights of the petitioner here flow from a concluded and final award of the Labour Court passed in an adjudication case between the petitioner and the predecessor of the Company. The award required the petitioner to be reinstated on the old terms and conditions of his service, granting him the benefit of continuity in service. He was also required to be paid back-wages, albeit calculated on daily basis.

41. This Court has already held that the award, read as a whole, clearly found that the petitioner was not a temporary employee or one serving on a fixed tenure. He was held to be a regular and permanent employee of the former KESA, going by the long period of his retention in service. It was on that basis that the petitioner's termination was found to be bad under Sections 6-N and 6-P of the Act of 1947. The award cannot be held to have found the petitioner to be a daily-wager or a fixed term employee. Be it right or wrong, the said award has become final. The sole reason why back-wages were not awarded to the petitioner in terms of a pay scale, after finding him to be not a temporary employer or a fixed term appointee, is the fact that the reference before the Labour Court was about the validity of the termination and not the wage entitlement of the petitioner. In fact, the Labour Court held that retaining the petitioner for such a long period of time, with periodical extensions in service, despite regular work being available, and juniors being retained in service, was unfair labour practice.

42. The purport of the award was so clear that the Company, who could, for whatever reason, not successfully assail it, were aware that it would entitle the petitioner to reinstatement with all back-wages since the date of his termination by

the erstwhile KESA. They were also aware that the terms of the award would confer upon the petitioner status of permanence in their establishment, in the event of reinstatement. It is these facts, circumstances and the imminent consequences of the award that led the Company to negotiate with the petitioner and enter into a settlement agreement in substitution of the rights of parties under the award. The petitioner apparently entered into the settlement, because it would bring to an immediate and predictable end, the uncertain and taxing course of further litigation in enforcement of the award.

43. It is in the background of the aforesaid facts that the genesis of the settlement agreement has to be considered, and rights of parties flowing therefrom construed. The award is explicit about the fact that it stems from and proceeds on the basis of rights of parties flowing from the award of the Labour Court. It brings about a mutual adjustment of rights of parties under the award, acceptable to both. This, however, does not mean that the directions in the award that have been held to be concluded and modified in terms of the settlement agreement, can be regarded as non-existent. These only stand discharged and modified in terms of the settlement agreement. As already remarked, but for the settlement agreement, the petitioner would have got continuity of service for all the period of time that he was employed with the KESA and the period that he was thrown out of service by them. That benefit for the petitioner would fall on the shoulders of the Company. The foremost of the burdensome consequences would be the liquidation of a long bill of back-wages, besides reinstatement of the petitioner, who had been adjudged a permanent employee of the Company's predecessors by the Labour Court. The petitioner would also be entitled to reckon his seniority in the service of the Company, counting all the days that he spent with their predecessor, KESA. It was to get rid of most of these taxing consequences of the award that the Company bargained with the petitioner to settle on terms expressed in the agreement, where the petitioner gave up almost everything due to him under the award, except his right to receive pension and gratuity, reckoned from 01.05.1982. Of course, reinstatement in service and adjustment on the post styled as a daily wage clerk, in the grade of Rs.4200-100-6400, was a part of the bargain.

44. The settlement agreement does not abnegate the adjudicated status of the petitioner as a regular and permanent employee of the erstwhile KESA, the Company's predecessor, but only obviates most of the consequences flowing from the award, particularly, back-wages and seniority. In consideration of the petitioner giving up his back-wages and seniority, he has been adjusted on the post of a daily-wage clerk in the pay scale of Rs.4200-100-6400 w.e.f. 01.10.2001, with other benefits as to seniority and promotion becoming available to him upon his acquiring the necessary necessary computer related skill and passing the typing test. All this would not have been so, if the award were to be enforced as it is. But, the petitioner accepted these terms to obviate, as already said, the taxing and uncertain course of further enforcement of his rights under the award through litigation, with all its known vagaries. It can, however, never be doubted that from the adjudication made for the petitioner by the Labour Court embodied in the award, the petitioner never gave up his right to receive pension and

gratuity, to which he was entitled as an employee of the erstwhile KESA. Rather, under the settlement agreement, the right to receive those two benefits, that were admissible to the employees of the KESA, was specifically preserved for the petitioner under paragraphs nos. 5 and 7 of the settlement agreement.

45. The stand of the Company that the petitioner has received a fresh appointment under them in terms of the letter of appointment dated 08.11.2001 w.e.f. 11.10.2001 and that the rules applicable to the Company, unlike their predecessor KESA, do not provide for pension and gratuity as post retirement benefits, but a Contributory Provident Fund alone, is misconceived. The petitioner's appointment by the Company is no fresh appointment under them of any kind. It is adjustment of the petitioner's rights in their establishment as an employee of the erstwhile KESA, that he has won on adjudication in an industrial dispute. Therefore, the petitioner's appointment in the Company's establishment is no more than an adjustment made by dint of the Labour Court award, based on the long service rendered by the petitioner with the KESA, found to be illegally terminated, as modified by the settlement agreement dated 07.11.2001.

46. This origin of rights of the petitioner to be absorbed/adjusted in the establishment of the Company is vivid from the letter of appointment dated 08.11.2001 issued by the Company, that is quoted in extenso :

कानपुर विद्युत आपूर्ति कम्पनी लि0
14/71, सिविल लाइन्स
केस्को-कानपुर

प्र0सं0-एफ0सी0-4अभि0 3/88/849
दिनाँक, 08 नवम्बर, 2001

कार्यालय-ज्ञाप

श्रम न्यायालय-चतुर्थ, उ0प्र0, कानपुर के अभिनिर्णय वाद संख्या-3/88 में हुये एवार्ड दिनाँक 18-1-96 के परिपालनार्थ उभय पक्षों में हुये समझौते दिनांक 8-11-01 के अनुपालन में श्री विजय शंकर त्रिपाठी पुत्र श्री भगवती प्रसाद त्रिपाठी को दिनाँक 11-10-2001 में दैनिक श्रेणी लिपिक (वेतनमान रु0 4200-100-6400) के पद पर निम्न सेवा शर्तों के अधीन समायोजित किया जाता है:-

(1) श्री विजय शंकर त्रिपाठी पुत्र श्री भगवती प्रसाद त्रिपाठी को दिनाँक 1-10-2001 से दैनिक श्रेणी लिपिक का पद व वेतनमान रु0 4200-100-6400 व उस पर अनुमन्य अन्य हितलाभ देय होगें किन्तु एवार्ड के अनुसार पेंशन व ग्रेच्युटी को छोड़कर पूर्व की अवधि का अन्य किसी प्रकार का हितलाभ अनुमय नहीं होगा।

(2) श्री विजय शंकर त्रिपाठी को कम्प्यूटर का ज्ञान अर्जित करने तथा टंकण परीक्षा उत्तीर्ण करने की तिथि से अनुमोदित दैनिक श्रेणी लिपिक पद के हितलाभ (जैसे वरिष्ठता/पदोन्नति व अन्य) अनुमन्य होगें व वार्षिक वेतन वृद्धि, समयबद्ध वेतनमान की गणना 1-10-2001 की तिथि से अनुमन्य होगी।

(3) अभिनिर्णय वाद संख्या-3/88 के अर्न्तगत माननीय श्रम न्यायालय द्वितीय उ0प्र0 कानपुर के समक्ष रू0 4200-100-6400 की यथावत का जो विनियमन वाद श्री त्रिपाठी द्वारा दाखिल किया गया है वह समाप्त माना जायेगा।

श्री विजय शंकर त्रिपाठी की दैनिक श्रेणी लिपिक के पद पर समायोजित करते हुये अरजियों की खण्ड, केस्को में तैनात किया जाता है।

ह0/अपठनीय
मो0 इफ्तिखारूद्दीन

प्रबंध निदेशक।

प्रतिलिपिः-निम्न को सूचनार्थ एवं आवश्यक कार्यवाही हेतु प्रेषितः-

1- महाप्रबंधक (वितरण)-प्रथम, केस्को।

2- उप मुख्य लेखाधिकारी, केस्को।

3- वरिष्ठ कार्मिक/प्रशासनिक अधिकारी, केस्को।

4- सहायक महाप्रबंधक (वा0 एवं वि0), जरीबचौकी खण्ड, केस्को को इस आशय के साथ प्रेषित कि वे श्री फूलचन्द, दैनिक श्रेणी लिपिक, जरीबचौकी खण्ड को स्थानान्तरित स्थान के लिये अवमुक्त करना सुनिश्चित करें।

5. सहायक अधीक्षक, लीगल सेल (स्थापना), केस्को।

6. न्यायालय पत्रावली।

7. श्री विजय शंकर त्रिपाठी पुत्र श्री भगवती प्रसाद त्रिपाठी।

8. कार्यालय अधीक्षक, स्थापना अनुभाग, केस्को।

9. श्री सी0के0 त्रिपाठी, स्थापना अनुभाग, केस्को।

ह0/ अपठनीय
(ओ0पी0 मिश्रा)
वरिष्ठ कार्मिक/प्रशासनिक अधिकारी।"

(emphasis by Court)

47. A perusal of the letter of appointment clearly traces the petitioner's right to the award of the Labour Court dated 18.01.1996, as subjected to adjustment on compromise between parties, in terms of the settlement agreement dated 07.11.2001. The first condition, subject to which the petitioner has been absorbed in the Company's service, clearly indicates the preserved right of the petitioner to receive pension and gratuity due under the award. In these circumstances, it can hardly be gainsaid that the Company, who on their establishment, do not have provision for payment of pension or gratuity to retired employees, are not bound by the settlement agreement dated 07.11.2001. The award of the Labour Court, giving rise to the agreement passed against the predecessor KESA, or still more, the letter of absorption/adjustment issued to the petitioner dated 08.11.2001, expressly preserve for the petitioner the right to receive pension and gratuity. All this is so because the petitioner is to be regarded and ever to be so regarded as an employee, who has come to the Company's establishment from the establishment of their predecessor KESA, where there was provision for payment of both pension and gratuity, post retirement to their employees.

48. It is not the Company's case that for employees of the former KESA, there is any statutory rule empowering them to vary or change conditions of service of such employees upon the Company, stepping into the shoes of the KESA. Therefore, the employees of the erstwhile KESA, who were entitled to pension and gratuity in their service, would continue to be entitled upon absorption in the Company's service. It is for the said reason that the Company with open eyes accepted for a term in the settlement agreement that the petitioner would forego all his monetary benefits relating to the period of service with the KESA that he was entitled to under the award, except his pension and gratuity reckoned w.e.f. 01.05.1982. For the same reason, the letter of absorption/adjustment issued by the Company to the petitioner dated 08.11.2001, reserves the petitioner's right to receive both pension and gratuity. It is, thus, not a case, where the petitioner is pleading or asserting a contractual right that conflicts with a statute, a statutory rule or a non-statutory regulation, governing post retiral benefits, admissible to

employees of the Company. He is asserting his rights under a concluded award of the Labour Court to the extent, it has been modified and mutually adjusted between parties through the terms of a contract incorporated in the settlement agreement.

49. Quite apart, the respondents are a State instrumentality and are required to be fair in their dealings with citizens in general, and their employees in particular. After all, they are always required to be model employers. The stand of the Company in securing a complete discharge of the petitioner's rights under the award passed by the Labour Court, that has become final through a settlement agreement recorded before the Conciliation Officer, and then turning around to deny one of the most valuable terms of that settlement favouring the petitioner, by pleading a rule regarding non-provision of pension and gratuity in the Company's establishment, is patently unfair and shockingly unconscionable; it is almost dishonest and mala fide. The Company's stand, if it were upheld, would be permitting them to rob the petitioner of a valuable part of the fruits of the award passed by the Labour Court in his favour, that he never bargained for in the adjustment of his rights in substitution of that award, incorporated in the settlement agreement. In fact, this stand of the Company, if upheld, would lead to a defeat of the petitioner's fundamental rights to a fair treatment by the State, guaranteed by Articles 14, 19 and 21 of the Constitution. It would be permitting the State to act very unfairly vis-à-vis their employee and a citizen.

50. It also deserves mention that the Company, while absorbing the petitioner in their service, have chosen to describe the petitioner as a daily rated clerk (दैनिक श्रेणी लिपिक). He has been likewise described in the settlement agreement dated 07.11.2001. This description for the petitioner is patently not just a misnomer, but one that does not and cannot describe his status correctly. For a fact, the Labour Court, while faulting the petitioner's termination of service as illegal, had determined the nature of his employment, holding that it was not temporary or for a specific period of time. It was, thus, implicitly regarded as permanent, even if that word was not used in the award. There is no scope, therefore, to infer that the petitioner was held to be a daily rated clerk by the Labour Court while passing the award between the petitioner and the KESA, that has become final.

51. Quite apart, both the settlement agreement dated 07.11.2001 and the consequential letter of absorption dated 08.11.2001, clearly say that the petitioner has been placed in the pay scale of Rs.4200-100-6400/- in more than one of the paragraphs. The petitioner has also been held entitled to seniority and promotion, subject, of course, to passing a typing test. There is no case that the petitioner has not passed that typing test, pleaded by the Company or otherwise brought to the Court's notice. It is a contradiction in terms to say that the petitioner is absorbed as a daily rated clerk and then to provide that he is placed in the pay scale of Rs.4200-100-6400/- with a right to earn seniority and promotion. A daily rated clerk cannot be appointed and placed in a pay scale. He is and has to be remunerated on a daily basis, which is not at all so in the petitioner's case; nor can it be so, given the rights that the petitioner has acquired under the award. Therefore, the petitioner's description in the settlement agreement and the letter of appointment as a daily rated clerk is no

more than a misnomer or a mis-description, that arises as a result of the Company's malice or a poor understanding of the law. In no case, it would derogate from the rights of the petitioner or his status as a regular and permanent clerk, placed in a certain pay scale, mentioned in the settlement agreement as well as his appointment order.

52. The result is that the decision of the Managing Director of the Company holding the petitioner disentitled to pension and gratuity, communicated through the impugned order dated 19.12.2014 issued by the Deputy Chief Accounts Officer of the Company, must be held to be manifestly illegal. It is required to be quashed.

53. This writ petition, accordingly, **succeeds** and stands **allowed** with **costs.**

54. Let a writ of certiorari issue, quashing the decision of the Managing Director of the Company communicated through the impugned order dated 19.12.2014, Annexure no.1 to the writ petition. Let a mandamus issue, ordering the Managing Director of the Company, its Chief Engineer and Deputy Chief Accounts Officer, respondent nos. 2, 3 and 4 in that order, to forthwith disburse the gratuity and arrears of pension due to the petitioner with 6% interest per annum, calculated on the sum of gratuity from the day after the petitioner's retirement and on the arrears of pension from the month next following the petitioner's retirement, all to be done within a period of one month of the date of receipt of a copy of this order. The respondents are further directed to pay regular pension month by month henceforth, on the date that it falls due, regularly and without interruption. Any delay in payment of the monthly pension would also carry interest at the rate of 6% for the period of time that the delay in disbursement occurs.

55. Let this order be communicated to the Managing Director, Kanpur Electric Supply Company Limited, the Chief Engineer, Kanpur Electric Supply Company Limited and the Deputy Chief Accounts Officer, Kanpur Electric Supply Company Limited, with all their offices located at KESA House 14/71, Civil Lines, Kanpur Nagar through the Chief Metropolitan Magistrate, Kanpur Nagar by the Registrar (Compliance).

(2021)06ILR A620
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 02.06.2021

BEFORE

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

Special Appeal No. 552 of 2017
Connected with
Spl. Appeals No. 421 of 2018, 296 of 2018 & 448 of 2018

State of U.P. & Ors. ...Appellants
Versus
Dr. Kishore Tandon & Ors. ...Respondents

Counsel for the Appellants:
Sandeep Dixit

Counsel for the Respondents:
Apoorva Tiwari, Alok Kumar Tripathi, Arun Kumar Srivastava, Ashok Shukla, Gyanendra Nath, Himanshu Raghava, Sanjay Tripathi, Vijay Kumar Srivastava

A. Service Law – Seniority - U.P. Government Servant Seniority Rules, 1991 - Rules 8(2), 8(3)(i) & 9(2) - U.P. Secretariat Ministerial Staff Rules, 1942 - Rules 14, 24 & 46 - U.P. Secretariat Ministerial Service Rules, 1999 - Rule 5 - U.P. Secretariat Upper Division Assistant &

Lower Division Assistant (Regularization of Officiating Promotion) Rules, 1990 - Rules 3(2), 4(1)(i), 4(3) & 4(4) - U.P. Secretariat Ministerial Staff (4th Amendment) Rules, 2002 - U.P. Fundamental Rules, 1987 - Rule 9(22).

In an intra-Court appeal, the scope of inquiry is limited. In the present appeals, the judgment of the learned Single Judge is challenged before this Court on the ground that whether the issue of regularisation/direct appointment of the persons appointed under the provisions of Rules, 1990 can be reopened or not. (Para 26)

Learned Single Judge vide impugned order dated 21.9.2017 observed that there are two aspects of service laws, which have to be separately applied in the facts of the case, one of which, is of regularisation and substantive appointment, and the other is seniority. Both are governed by separate rules and both cannot be confused and mixed with each other. It is also observed by the writ Court that an incumbent has to be regularized or appointed on a substantive vacancy, and the date on which he is regularized or appointed on a substantive vacancy, would be the relevant date for his entry in the cadre and for fixation of his seniority. Once the date of regularisation of substantive appointment in the cadre is fixed, the same cannot be changed. (Para 31)

The seniority has to follow the said date of regularization and/or substantive appointment on a vacancy in the cadre. For the said purpose, firstly an exercise for deciding the number of vacancies available for regularization as per the Regularization Rules, 1990 ought to be calculated by the State Government. The Rules, 1990 were initiated on 23.7.1990 and on this date, the regularisation also took place. Thus, the vacancies, as per the provisions of the aforesaid Rules have to be available on 22.7.1990. Learned Single Judge further observed that on the said date, admittedly, a large number of LDAs were officiating as UDA and were occupying the post of LDA, hence, the post, they were occupying, cannot be considered as the vacant post at the time of regularisation of officiating LDA. Learned Single Judge also observed that 2032 persons were required to be regularised as LDA while the total number of posts available in the cadre was 1235 and some of which were already occupied. Thus, even the entire cadre strength was much less than the persons required to be regularised. It would also not leave any vacancy available in the year 1991 or 1994 for being requisitioned to Commission. (Para 31)

With the aforesaid observations, learned Single Judge set aside the seniority list dated 8.9.2015 and directed the State Government to regularise LDAs on the posts, as were available on 22.7.1990 and, accordingly, fixed their seniority on the date of their appointment in substantive vacancy as directed by the Division Bench. (Para 31)

It is evident from the record that 773 posts were created vide Government order dated 6.8.1990, therefore, 773 persons regularised under the Rules, 1990 were entitled to get their seniority from 6.8.1990 and not before this date. Admittedly, the issue of regularisation/recruitment of 2004 persons was already decided by the coordinate Bench and the said judgment has also been affirmed by the Hon'ble Apex Court in SLP (C) No. 23254 of 2014, hence, the same cannot be re-opened. Thus, 1231 persons appointed under the provisions of Rules, 1990 read with Rules 1942 are entitled to get their seniority from 23.7.1990 and remaining 773 persons are entitled to get their seniority from 6.8.1990 after creation of post of LDA and not from 23.7.1990. (Para 32, 36, 37)

B. A person, even appointed against a supernumerary post, is entitled to seniority from the date of his substantive appointment. All the vacancies created temporarily for recruitment of the officiating LDA, come within the cadre. The coordinate Bench has already dealt the issue that 2004 persons appointed under the provisions of Rules, 1990 are direct recruits, therefore, they cannot be deprived from their seniority and they are entitled to get their seniority from the date when the substantive posts were made available. (Para 33)

C. It is well-settled by the Hon'ble Apex Court that the seniority will be given from

the date when the employee born in the cadre, therefore, the persons appointed in pursuance of the requisitions dated 19.3.1991 and 13.4.1994, cannot be placed above the persons appointed in the year 1990. (Para 37)

As the respondent-petitioners are appointed against the U.P. Secretariat Upper/Lower Division Clerks Examinations 1991 & 1995, in pursuance of requisition of State Government dated 19.3.1991 and 13.4.1994, therefore, they are entitled for their seniority from the date of their appointment as per Seniority Rules, 1991. (Para 37)

Seniority should not be reckoned retrospectively unless it is so expressly provided by the relevant Service Rules. The Supreme Court held that seniority cannot be given to an employee who is yet to be borne in the cadre and by doing so it may adversely affect the employees who have been appointed validly in the meantime.

Inter se seniority in a particular service has to be determined as per the service rules. The date of entry in a particular service or the date of substantive appointment is the safest criterion for fixing seniority inter se between one officer or the other or between one group of officers and the other recruited from different sources. Any departure therefrom in the statutory rules, executive instructions or otherwise must be consistent with the requirements of Articles 14 and 16 of the Constitution.

In the present case, as it is evident that on 23.7.1990, only 1231 posts of LDAs were available, but 2004 persons officiating as LDA were appointed under the Rules, 1990, i.e., 773 persons were appointed beyond the sanctioned strength, therefore, 773 temporary posts of LDA were created on 6.8.1990, thus, we hereby hold that the said 773 persons are entitled for seniority from 6.8.1990. We further hold that persons appointed against the Examinations 1991 & 1995 are entitled to get their seniority as per Rules, 1942 read with Seniority Rules, 1991. (Para 38)

Special Appeals allowed. (E-3)

Precedent followed:

1. J.S. Yadav Vs St. of U.P. & anr., (2011) 6 SCC 570 (Para 16)

2. U.O.I. Vs Puspa Rani, (2008) 9 SCC 242 (Para 16)

3. Pramod Kumar Trivedi Vs St.of U.P., 2012 (11) ADJ 253 (Para 16)

4. U.O.I. & anr. Vs Dr. Akhilesh Chandra Agarwal, (1998) 4 SCC 107 (Para 16)

5. Dr. D.K. Reddy & anr. Vs U.O.I. & ors. (1996) 10 SCC 177 (Sub Para 1 of Para 16)

6. K. Meghachandra Singh & ors. Vs Ningam Siro & ors., 2020 (5) SCC 689 (Sub Para 2 of Para 37)

Precedent distinguished:

1. Rajasthan State Industrial Development & Investment Corporation Vs Subhash Sindhi Cooperative Housing Society, (2013) 5 SCC 427 (Para 18, 26)

2. N. Ramachandra Reddy Vs State of Telengana, (2020) 16 SCC 478 (Sub Para 1 of Para 18, 26)

3. Prem Singh Vs St.of Har., (2009) 14 SCC 49 (Para 23)

4. Gaon Real Estate and Construction Ltd. Vs U.O.I. (201) 5 SCC 388 (Sub Para 2 of Para 23)

Present appeals assail order dated 21.09.2017, passed by learned Single Judge.

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

1. Heard Dr. L.P. Mishra, learned counsel appearing on behalf of the State/appellants and Shri Anil Kumar Tiwari, learned Senior Advocate assisted by Shri Apoorva Tiwari, learned Counsel for the respondents.

2. All the appeals have been preferred against the judgment and order dated 21.09.2017 passed by learned Single Judge in Writ Petition (S/S) No. 5828 of 2015 (Dr. Kishore Tandon & Ors. Vs. State of U.P. & Ors.) along with connected Writ Petition (S/S) No. 12598 of 2017 (Hari Shankar Nath Tiwari & Ors. Vs. State of U.P. & Ors.), on the ground that the directions issued by the learned Single Judge with regard to reopening of the appointment/regularisation of the Lower Division Assistants (hereinafter referred as "LDA") in U.P. Secretariat under U.P. Secretariat Upper Division Assistant & Lower Division Assistant (Regularisation of Officiating Promotion) Rules, 1990, are in utter violation of the directions issued by a coordinate Bench of this Court in Special Appeal No. 31 of 2005 vide judgment and order dated 8th May, 2015, which have been upheld by the Hon'ble Apex Court in SLP (C) No. 23254 of 2014 vide order dated 29.03.2017.

3. Factual matrix of the case is that the respondents-petitioners, who were selected and appointed through U.P. Public Service Commission on the post of Lower Division Assistant (hereinafter referred to as the "LDA'), approached the writ Court with the grievance that the directions issued by the coordinate Bench of this Court in Special Appeal No. 31 of 2005 dated 8th May, 2015 were not followed at the time of preparation of seniority list dated 08.09.2015. Further, Rule 9(2) of U.P. Government Servant Seniority Rules, 1991 was also not considered. The prayer sought by the respondent-petitioners in the said writ petition was that the seniority list of LDA of U.P. Secretariat is liable to be set aside. They also prayed for mandamus commanding the appointing authority to redetermine the seniority of the respondent-petitioners and place them in the seniority list after serial no. 810. The prayers sought in the said writ petition are reproduced hereunder:

"(a) to issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 08.09.2015 and the final seniority list for the cadre of assistant review officer as contained in Annexure No. 1 to this writ petition;

(b) to issue a writ, order or direction in the nature of mandamus commanding the respondent nos. 1 to 3 to re-determine the seniority of the petitioner and place them in the seniority list after serial no. 810."

4. While placing the facts of the case, Shri L.P. Mishra, learned counsel for the appellants submitted that in the Secretariat of Uttar Pradesh, the ministerial staffs were regulated under the provisions of U.P. Secretariat Ministerial Staff Rules, 1942 (hereinafter referred to as "Rules, 1942').

Due to exigency of service, the persons working on the posts of Typist, Telephone Operators, Tele Printer, Talex Operator/Junior Grade Clerk were allowed to officiate as LDA from 1st April, 1989 and were continuing as such. Similarly, persons substantively appointed as LDA were allowed to officiate in the capacity of Upper Division Assistant (for short the "UDA'). Learned counsel for the appellants submitted that thereafter, in exercise of powers conferred under Article 309 of the Constitution of India, Hon'ble Governor vide Notification dated 23.07.1990 was pleased to frame Rules for regularisation/appointment of the persons officiating/working on the post of LDA as well as UDA in the U.P. Secretariat. The

said Rule is known as U.P. Secretariat Upper Division Assistant & Lower Division Assistant (Regularisation of Officiating Promotion) Rules, 1990 (hereinafter referred to as Rules, 1990).

Further submission advanced by Dr. L.P. Mishra is that on 23.07.1990, total sanctioned strength of LDA was 1259 (808 permanent + 451 temporary). However, as on the said date, i.e., on 23.07.1990, total 2032 persons were working as LDA, (28 persons, who were holding substantive post of LDA and 2004 persons, who were working as officiating LDA), the State Government, with the intention to regularise all the 2004 persons officiating/working on the post of LDA, vide Office Memo dated 6th August, 1990 created 773 temporary posts of LDA in accordance with law. Learned special Counsel also submitted that the aforesaid Office Memo clarifies that creation of the aforesaid posts are made only with the intention to regularise all the persons officiating/working on the post of LDA and no fresh appointment would be made on these posts. It further clarifies that when the regular vacancy arises, the person regularised on the temporary post shall be shifted/merged on the said regular post and his vacant post would be abolished automatically. Learned counsel for the appellants also submitted that all 2004 persons were regularised on the post of LDA w.e.f. 23rd July, 1990 by way of separate regularisation order to each individual under the provisions of the Rules, 1990. Thereafter, vide orders dated 24.07.1991 and 25.07.1991, the seniority list of LDA was issued.

5. Dr. L.P. Mishra, Special Counsel appearing for State of U.P./appellant submitted that Part II of Rules, 1942 provides the strength of the staff, which was divided in four groups. Group A is denoted as superior and it consists 4 cadres, Group B denotes as subordinate, which consists 5 cadres, Group C denotes Stenographer and Group D denotes miscellaneous petty posts, which are outside the purview of Commission. Part III of the Rules, 1942 provides the source of recruitment of the staff and the LDA are to be appointed by competitive examinations conducted by the Commission, subject to the provisions of Rules 14 and 24 of the Rules, 1942.

Relevant part of Part II as well as Part III of the Rules, 1942 are quoted hereunder :

"PART II - CADRE

Rule 3. Strength of the Staff - (1) The strength of the staff both permanent and temporary, shall be such as may be determined by the Governor from time to time:

Provided that the appointing authority may leave unfilled or hold in abeyance any vacant post in any cadre without thereby entitling any person to compensation.

Note - The present sanctioned staff consists of the following separate cadres:

(A) Superior

(1) Upper Division Assistants (including Assistants Superintendents) -114

(2) Translators (including Assistant Superintendents) - 24

(3) Journalists - 4

(B) Subordinate

(1) Treasurer - 1

(2) Budget Assistant - 1

(3) Reference Clerk (Including Accountant) - 29

(4) Lower Division Assistants - 106

(5) Hindi and Urdu Typists - 4

(C) Stenographers

Stenographers - 26

(D) Miscellaneous petty posts specified below which are outside the purview of the Commission

(1) Caretaker, Council House - 1

(2) Telephone Operators - 4

(3) Typewriter Mechanic - 1

(4) Junior Grade Clerks - 8

(ii) The staff as a whole does not constitute one service. The classes of posts enumerated under the heading "(A) Superior" in the Note above are not inter-changeable one another nor with the posts of stenographer. Members of a lower class have no right to posts in a higher class except to the extent indicated in these rules.

4. Status - The status of the staff is that of a non-gazetted subordinate ministerial service.

Note - The post of Caretaker, Council House has been treated as non-ministerial though minister servants may be appointed to it.

PART III - RECRUITMENT

Rule 5. Sources of recruitment - Recruitment to the staff shall be made as follows:

(A) Superior

1. Upper Division Assistants - By competitive examination conducted by the Commission, except as provided in rule 21.

2. Translators - By competitive examination conducted by the Commission, subject to the provisions of rule 12.

(B) Subordinate

1. Treasurers, Additional Treasurers, Assistant Treasurers,Treasurers-cum-Accountants	By promotion under rule 27 in consultation with the Commission.
2. Accountants and Budget Assistants (posts carrying special pay)	By promotion under Rule 28
3. Reference Clerks (including posts of Accountants and Budget Assistants carrying no special pay)	By competitive Examinations conducted by the Commission subject to the provisions of rules 14 and 24.
4. Lower Division Assistants (C) Stenographers	By competitive Examination conducted by the Commission subject to the provisions of rules 13.

(D) Miscellaneous petty posts outside the purview of the Commission

(a) Caretaker, Vidhan Bhawan (b) Telephone Operators (c) Typewriter Mechanic (d) Junior Grade Clerks	By Selection under rule 20 without a reference to the Commission.

5-A. Saving in respect of Estate Department - Notwithstanding anything contained in rule 5 or any other provision in these rules, such members of the staff of Government Estate Department as were holding substantive appointments in that department, immediately before April 1, 1965, shall, in consequence of the merger of the department with the Uttar Pradesh Secretariat, become and e deemed to be, on

and from the said date, members of the staff within the meaning of rule 2(1).

9. Academic qualifications - The minimum academic qualification required of candidates for direct recruitment to various categories of posts shall be -

(1) Upper Division Assistants : A degree of a University.

(2) Translators (Hindi and Urdu) : A degree of a University. A candidate for the post of Translator must have taken one of het following languages in his degree examination:

(1) Urdu

(2) Hindi

(3) Persian

(4) Sanskrit

(5) Arabic

(3) x x x x x x x x x x x x x x x

(4) Lower Division Assistants : Bachelor's degree from a recognised University.

Provided that the minimum academic qualification, in respect of the candidates who have been serving in the Secretariat as Lower/Upper Division Assistant from a date earlier than January 9, 1959 shall be High School Examination Certificate and after the aforesaid date it shall be Intermediate.

(5) x x x x x x x x x x x x x x x x

(6) Stenographers : Intermediate Examination Certificate.

(7) (i) Telephone Operators : High School Examination Certificate

(ii) Junior Grade Clerks : Intermediate Examination Certificate

(8) Caretaker, Council House : Intermediate Examination Certificate

(9) Typewriter Mechanic : Efficiency in the repairs of typewriters with a thorough knowledge of their mechanism; preference being given to a candidate who possess the High School Examination Certificate.

9-A. Exemption from educational qualification of merged staff of Estate Department- Nothing contained in rule 9 shall apply or deemed to have ever applied to the members of the staff of the Government Estate Department to whom rule 5-A of these rules applies.

14. Reservation of vacancies in the posts of Lower Division Assistants in special circumstances -

(1) x x x x x x x x x x x x x x x x

(2) The appointing authority may, in special circumstances but not generally, and with the concurrence of the Commission, reserve in any year up to eighty percent of the total number of permanent vacancies intended to be filled in that year, for department candidates who have rendered temporary or officiating service in the said or higher post for such total period as may be fixed in that behalf in consultation with the Commission and whose work is considered by the appointing authority to be satisfactory. The vacancies so reserved may be filled on the basis of a qualifying examination to be conducted by the Commission, from amongst candidates who come up to such standard as is considered by the Commission to be reasonable. There shall be no upper age limit for such candidates either for their appearance at the said qualifying examination or in the event of their success at that examination, for their appearance- on equal terms with the candidates for direct recruitment at any subsequent competitive examination referred to in rule 5 in respect of the posts of Lower Division Assistants.

(3) Notwithstanding anything contained in rule 14(2) or in any other rule, the appointing authority may, having

regard to the exigencies of Public Service, fill in existing permanent vacancies in the posts of Lower Division Assistants to the extent of 80 percent from such departmental candidates who were recruited in previous years through the Commission against temporary vacancies or those recruited on the basis of a qualifying examination and who have completed at least one year's temporary or officiating service on the post of a Lower Division Assistant or on an higher post and whose record of service is considered to be satisfactory.

24. Reservation of vacancies in the posts of Lower Division Assistants - (1) One vacancy in the posts of Lower Division Assistants shall be reserved in every alternate year of recruitment, for such Telephone Operators and Junior Grade Clerks and approved candidates on the waiting lists for these posts as have rendered in the Secretariat a total service of not less than three years, including officiating or temporary service, as on the first day of the year in which the examination referred to in rule 5(B)(4) is held and whose work after a consideration of their character rolls and personal filed, if any, is considered by the appointing authority to be satisfactory and who come up at the said examination to such standard as is considered by the Commission to be reasonable."

6. Dr. L.P. Mishra next submitted that Rule 46 of the Rules, 1942 provides the determination of the seniority, which states that the seniority of a member of the staff shall ordinarily be determined in the class to which he is appointed by the date of his substantive appointment and in case of more than one person appointed on the same date, according to their respective positions in the waiting list.

Rule 46 of Rules, 1942 is reproduced hereunder:

"Rule 46. Seniority - The seniority of a member of the staff shall ordinarily be determined in the class to which he is appointed by the date of his substantive appointment and in the case of more than one person appointed in the same date according to their respective positions in the waiting list.

Provided that the seniority of such members of the staff as were holding substantive appointments in the Government Estate Department immediately before April 1, 1965 shall in consequence of the merger of that Department will the Uttar Pradesh Secretariat be determined in such a manner that for every two years of service rendered by them in a substantive capacity in that Department before the said date, they shall be allowed the benefit of one year's substantive service, and their seniority vis-a-vis the other members of the staff shall be fixed accordingly."

7. Dr. L.P. Mishra, learned counsel for the appellants submitted that for regularisation of officiating departmental candidates, Rule 14(2) of the Rules, 1942 was amended by way of promulgation of U.P. Secretariat Ministerial Staff Rules, 1982. On the advise of task force, for the smooth and expedite working in the Secretariat, the Government decided to abolish 427 posts of typists and to create 427 temporary posts of LDA vide Notification No. 697/20-E-5-110/87-TC/88 dated 10th February, 1989.

It has next been submitted by the learned counsel for the appellants that

several employees, who were holding different posts as per the provisions of Rules, 1942, were given officiating charge of LDA and were performing the said duties for quite long time, as such, the State Government extended the benefit of regular appointment to those persons working on the higher posts, in officiating capacity, by promulgating the Rules, 1990 on 23.07.1990. Rule 2 of Rules, 1990 provides that it is having overriding effect on other Rules or Order. Rule 4 of Rules, 1990 provides that the person, who has initially been appointed on the post of Typist or Telephone Operators or Tele Printer or Talex Operator or Junior Grade Clerk and has subsequently been promoted in an officiating capacity to the post of LDA on or before 01.04.1989 and is continuing on such post, shall be considered for regular appointment in permanent or temporary vacancy that may be available to the post of LDA. Rule 6 of Rules, 1990 provides that appointment made under these Rules shall be deemed to be appointment under Service Rules, i.e., Rules, 1942. Rule 7 of the Rules, 1990 provides that persons appointed under the said rules, shall be entitled to seniority in accordance with the Service Rules and for this purpose, selection under these Rules, shall be deemed to be selection under Service Rules. Rules 4 to 8 (relevant) of the Rules, 1990 are as under :

" 4. (1) Any person who -

(i) was appointed to the post of Lower Division Assistant after being approved by the Commission for regular appointment to such post and was subsequently promoted in an officiating capacity, to the post of Upper Division Assistant before April 1, 1989 and is continuing as such ;

(ii) was initially appointed to the post of Typist or Telephone Operator or Teleprinter Operator or Telex Operator or Junior Grade Clerk, on a regular basis, and was subsequently promoted in an officiating capacity to the post of Lower Division Assistant before April 1, 1989 and is continuing as such or on a higher post;

shall be considered for regular appointment in permanent or temporary vacancy as may be available, to the post of Upper Division Assistant regarding persons falling under clause, (i) and to the post of Lower Division Assistant regarding persons falling under clause (ii).

(2) In making regular appointment under these rules, reservation for candidates belonging to the Scheduled Castes, Scheduled Tribes, and other categories shall be made in accordance with the orders, the Government in force at the time of consideration for regularisation under sub-rule (1).

(3) For the purpose of sub-rule (1) the appointing authority shall constitute a Selection Committee comprising;

1. One Officer not below the rank of Joint Secretary to the Government nominated by the Chief Secretary.

2. One Officer not below the rank of Joint Secretary to the Government in Personnel Department, nominated by Secretary to the Government in Personnel Department.

3. One Officer not below the rank of Joint Secretary to Government in Secretariat Administration Department nominated by Secretary to the Government Secretariat Administration Department.

The senior most officer shall be the chairman.

(4) The appointing authority shall, having regard to the provisions of sub-rule (1), prepare an eligibility list of the candidates, and place it before the Selection Committee alongwith character rolls and such other records as may be considered necessary to assess their suitability.

(5) The Selection Committee shall consider the cases of candidates on the basis of their records referred to in sub-rule (4).

(6) The selection Committee shall prepare a select list of candidates, and forward it to the appointing authority.

(7) Where in respect of any person, who is eligible for being considered for regularisation under these rules, a formal departmental enquiry is pending or there is an order of the Court on account of which or for any other reason due to which it is not possible to make regular appointment by promotion of such a person. Selection Committee shall place its recommendation in a sealed cover and shall mention this fact against the name of the concerned person in the list prepared under sub-rule (6).

5. The appointing authority shall, subject to the provisions of sub-rule (2) and (7) of rule 4, make appointments from the list prepared under sub-rule (7) ;

Provided that in the cases covered by the provisions of sub-rule (7) of rule 4, action shall be taken by the appointing authority in accordance with the orders of the State Government.

6. Appointments made under these rules shall be deemed to be appointments under the Service Rule.

7. A person appointed under these rules shall be entitled to seniority in accordance with the Service Rules and for this purpose selection under these rules shall be deemed to be selection under the Service Rules :

Provided that the inter-se seniority of the candidates so appointed shall be the same as it was in the cadre from which they were promoted on an officiating basis.

8. Where a person, promoted on officiating basis, is not found suitable or whose case is not covered by sub-rule (1) of rule (4) of these rules, he shall, at once, be reverted to the substantive post from which officiating promotion was made and on such reversion he shall not be entitled to any compensation."

8. Adding to his arguments, Dr. L.P. Mishra, learned counsel for the appellants submitted that thereafter in exercise of powers conferred by Article 309 of the Constitution of India, in suppression of all existing rules or orders in relation to the service of Ministerial Staff of U.P. Secretariat, the State Government promulgated U.P. Secretariat Ministerial Service Rules, 1999 (hereinafter referred to as "Rules, 1999').

Rule 5 of the Rules, 1999 provides 6 cadres of the post in the service, i.e., (i) Upper Division Assistant, (ii) Lower Division Assistant, (iii) Telephone Operator, (iv) Fax Calculator-cum-Typist, (v) Typewriter mechanic, (vi) Junior Grade Clerk.

Source of recruitment for the post of LDA is 60% by direct recruitment through Commission, 40% by promotion through the Commission, from amongst substantive appointed Telephone Operator (6%), Typist (84%), Junior Grade Clerk (10%), who have completed 5 years' service as such, on the 1st day of the year of recruitment.

By way of 4th amendment known as U.P. Secretariat Ministerial Staff (4th Amendment) Rules, 2002 made in Rules, 1999, the nomenclature of UDA and LDA was changed by designating it as Sameeksha Adhikari (Reviewing Officer) and Sahayak Sameeksha Adhikari (Assistant Reviewing Officer).

9. It has also been submitted by the learned counsel for the appellants that requisitions dated 19.03.1991 and 13.04.1994 were sent to the Public Service

Commission for selection on the posts of LDA, i.e., 61 and 76 respectively with corrigendum dated 18.11.1994. After completion of the selection process, the appointment orders were issued on 30th May, 1999, 11th July, 1996 and 3rd February, 1999. Thereafter, seniority list dated 05.05.2000 and 02.11.2000 was issued for the post of Assistant Reviewing Officer and its consequential order was issued on 21.11.2000.

The aforesaid seniority lists dated 24.07.1991, 25.07.1991, 05.05.2000 as well as 02.11.2000 and its consequential order dated 21.11.2000 were challenged before a writ Court by means of Writ Petition No. 6012 (S/S) of 2000 (Suryamani Singh & Ors. Vs. State of U.P. & Ors.) on the ground that the same have been made without following the Rules, 1942, Rules, 1990 and Rules, 1999.

10. The writ court while allowing the above writ petition vide order dated 06.08.2004 quashed the seniority list dated 02.11.2000 and consequential order dated 21.11.2000. The writ Court also directed to modify the seniority list published on 24.07.1991 and 25.07.1991 maintaining at least 20% quota for direct recruits appointed up to 18th February, 1999 and thereafter 60% for direct recruits and 40% for promotees or regularised promottees, by applying Rules 8(2) and 8(3)(i) of Seniority Rules, 1991 and to provide prescribed quota for each selection year in the light of observations made therein and thereafter to promote the directly recruited candidates on the post of UDA from the dates their juniors had been promoted with consequential benefits.

11. The aforesaid judgment dated 06.08.2004 was challenged by the State Government in Special Appeal No. 31 of 2005 (State Vs. Suryamani Singh & Ors.), on the ground that the persons, who were initially appointed on the posts of Typist, Telephone Operators, Tele Printer, Talex Operator/Junior Grade Clerk and were allowed to work on the post of LDA on officiating basis, were extended the benefit of regular/direct appointment under the provisions of U.P. Secretariat Upper Division Assistant (Regularisation of Officiating Promotion) Rules, 1990 w.e.f. 23.07.1990. Thereafter, the seniority list dated 24.07.1991 and 25.07.1991 were issued, which became the subject matter of consideration in Writ Petition No. 6200 (S/B) of 1993 along with other connected matters before a Division Bench of this Court and the said writ petition was dismissed on 02.07.1996. Further ground taken by the State Government in Special Appeal No. 31 of 2005 was that a Special Leave Petition No. 25086 of 1996 (U.P. Secretariat UDA Association Vs. State of U.P. & Ors.) was also filed against the aforesaid judgment of the writ Court dated 02.07.1996, which was dismissed by a speaking judgment and order dated 27th January, 1997 and the validity of the seniority lists dated 24.07.1991, 25.07.1991 along with Rules, 1990 were upheld, therefore, the same cannot be reopened.

It has vehemently been submitted by Dr. L.P. Mishra, learned Special Counsel for the appellants that the coordinate Bench of this Court vide judgment and order dated 08.05.2015 passed in said Special Appeal No. 31 of 2005 again upheld the validity of Rules, 1990 as also the appointment of the persons under Government Order dated 23.07.1990 under Rules, 1990 declaring them as direct recruits and, thus, the selection and regular appointment made under Rules, 1990 has attained finality,

12. Reiterating his submissions with regard to justification of creation of 773 temporary posts of LDA by the State Government to give regular appointment to the persons officiating/working on the post of LDA, Dr. L.P. Mishra submitted that as on 23.07.1990, 2032 persons (2004 officiating + 28 substantively appointed) were working on the post of LDA, but as the substantive vacancies available were 1259 (permanent 808 + temporary 451), vide Government Order dated 06.08.1990, 773 temporary posts of LDA were created by the State Government. Again clarifying the position, learned counsel for the appellants submitted that Para 2 of the Rules, 1990 provides that aforesaid vacancies are temporary posts in the cadre of LDA up to 28th February, 1991 and the persons when merged/shifted in the regular cadre posts, the aforesaid created 773 posts will not be filled up in future and these posts shall be automatically deemed abolished.

The Government Order dated 06.08.1990 is being reproduced as under :

''उत्तर प्रदेश शासन
सचिवालय प्रशासन (अधिष्ठान) अनुभाग–5
संख्याः 4861/20–इ–5–191/90
लखनऊः दिनांक 06 अगस्त, 1990
कार्यालय–ज्ञाप

उत्तर प्रदेश सचिवालय में प्रवर वर्ग सहायक एवं अवर वर्ग सहायक के पदों पर स्थानापन्न व्यवस्था में दीर्घ समय से कार्यरत कर्मचारियों की सेवाओं को विनियमित करने का शासन द्वारा निर्णय लिया गया है। चूँकि उ0प्र0 सचिवालय में अवर वर्ग सहायक के 808 स्थाई एवं 451 अस्थाई, कुल 1259, पद सृजित है और इनके विरूद्ध कार्यरत विनियमित होने वाले कर्मचारियों की संख्या 1856 है, तथा अनुसूचित जातीय/जनजातीय कर्मचारियों का आरक्षण कोटा पूरा करने के लिये 139 अतिरिक्त पदों तथा लेखा संवर्ग में कार्यरत कर्मचारियो हेतु सुरक्षात्मक दृष्टिकोण से 37 पदों के उपलब्ध कराने की स्पष्टतः आवश्यकता होगी। अतः अवर वर्ग सहायक संवर्ग में पदों की उक्त कमी को दृष्टिगत रखते हुए, कार्यरत स्थानापन्न कर्मचारियों की अवर वर्ग सहायक के पदों पर विनियमित करने के उद्देश्य से, राज्यपाल महोदय उत्तर प्रदेश सचिवालय में अवर वर्ग सहायक के 773 अस्थाई पद वेतनमान रू0 1200–30–1560–द.रो. –40–2040 में सृजित किये जाने की सहर्ष स्वीकृति निम्नलिखित शर्तों के अधीन प्रदान करते हैः–

(1) उक्त पदों के धारकों की शासन द्वारा समय समय पर जारी आदेशों के अन्तर्गत महंगाई भत्ता यथा अन्य भत्ते, जो भी अनुमन्य हो, देय होंगे।

(2) उक्त अस्थाई पद उ0प्र0 सचिवालय के अवर वर्ग सहायक के पदों में अस्थाई वृद्धि के रूप में माने जायेंगे।

(3) उक्त सभी अस्थाई पद, यदि वह बिना किसी पूर्व सूचना के समाप्त न कर दियें जायें, दिनांक 28.2. 1991 तक की अवधि के लिये सृजित रहेंगे।

(4) उपरोक्त पदों का सृजन अवर वर्ग सहायक के पदों पर विनियमितीकरण के लिये ही किया जा रहा है, और इन पदों पर किसी भी दशा में कोई नयी नियुक्ति नही की जायेगी तथा जैसे जैसे इनके पदधारी अन्य संवर्ग के पदों पर समायोजित होते जायेंगे वैसे वैसे यह पद स्वतः समाप्त माने जायेंगे।

2. इस सम्बन्ध में होने वाला व्यय चालू वित्तीय वर्ष 1990–91 के आय–व्ययक की अनुदान संख्या–84 के निम्नलिखित लेखा शीर्षकों के अन्तर्गत सुसंगत इकाइयों के नामें डाला जायेगाः–

1– ''2052–सचिवालय–सामान्य संवायें
आयोजनेत्तर–090–सचिवालय–01–सचिवालय''
2– ''2251–सचिवालय–सामाजिक संवायें
आयोजनेत्तर–090–सचिवालय–01–सचिवालय''
3– ''3451–सचिवालय–आर्थिक संवायें
आयोजनेत्तर–090–सचिवालय–01–सचिवालय''

तथा व्यय को बचतों से वहन किया जायेगा।

3. ये आदेश वित्त विभाग की अशासकीय संख्या–ई–5–1269/दस–90 दिनांक 3 अगस्त, 1990 में प्राप्त उनकी सहमति से जारी किये जा रहे है।

देवी दयाल
सचिव।

संख्या 4861(1)/20–ई–5–191/90, तद्दिनांक

प्रतिलिपि निम्नलिखित को सूचनार्थ एवं आवश्यक कार्यवाही हेतु प्रेषितः–

(1) सचिवालय के अधिष्ठान कार्य से सम्बन्धित समस्त अनुभाग
(2) सचिवालय प्रशासन (अधिष्ठान) अनुभाग–1
(3) वित्त (व्यय–नियन्त्रण) अनुभाग–5
(4) वित्त (वेतन–आयोग) अनुभाग–1/2 (छः छः प्रतियॉ)
(5) सचिवालय प्रशासन (लेखा) अनुभाग–1/2/3

⑹ प्रशासनिक सुधार अनुभाग–2
⑺ विभागीय पुस्तिका।
⑻ वित्त (आय–व्ययक) अनुभाग–2
⑼ स्थानिक आयुक्त कार्यलय, नई दिल्ली।
आज्ञा से,
(आर.एन. श्रीवास्तव)
विशेष सचिव।''

13. Dr. L.P. Mishra further submitted that the coordinate Bench while upholding the validity of Rules, 1990, held that the persons appointed in accordance with the Rules, 1990 are direct recruitees. It is further observed that benefit of Rules, 1990 was given to 2032 persons working/officiating on the post of LDA and the 773 posts of LDA were temporarily created vide order dated 06.08.1990. It is also observed by the coordinate Bench that 773 persons were appointed/regularised prior to the declaration of vacancies, however, the seniority can be claimed by the incumbents from the date of substantive appointment against the vacancies, meaning thereby, 773 persons are entitled to get the seniority from the date of availability of the vacancies, i.e., 06.08.1990.

The coordinate Bench observed that at the time of implementation of Rules, 1990, available vacancies of LDA were not examined. Special appeal was allowed by setting aside the judgment and order of the writ Court dated 6th August, 2004 as also the seniority list dated 2nd November, 2000 as well as the rejection of representation dated 21.11.2000 and all consequential actions. The coordinate Bench also clarified that the seniority lists of LDA are to be determined in view of the observation and principles spelled out in the judgment as well as the Rules and Regulations, applicable as per law. After exercise is completed, the seniority list dated 24.07.1991 and 25.07.1991 would stand modified, accordingly, if necessary fall out of such exercise. Applications for validity of Rules, 19990 was also rejected.

14. Learned special Counsel for the State also submitted that aforesaid judgment of the coordinate Bench dated 8th May, 2015 was challenged in SLP (C) No. 23254 of 2014 before the Hon'ble Apex Court, which was also dismissed vide order dated 29.03.2017.

However, in the meantime, seniority list dated 08.09.2015 was issued in compliance of the order dated 08.05.2015 passed in Special Appeal No. 31 of 2005. The said seniority list dated 08.09.2015 was challenged by the private respondents herein by approaching the writ Court on the ground that the seniority list dated 08.09.2015 has been issued in gross violation of the specific directions of this Court issued in Special Appeal No. 31 of 2005. Further ground of challenge made in the writ petitions was that the petitioners, who were direct recruits on the post of LDA through the U.P. Public Service Commission on a requisition sent in respect of vacancies and were appointed during the years 1996 to 1999, are loosing their seniority as their substantive appointment was being altered to 2000-2001. Their grievance was that as 773 temporary/supernumerary posts were created for the purpose of regularisation/appointment of the officiating persons on the post of LDA, thus, the said persons appointed on the said 773 post could not count seniority and their names could not be included in the seniority list.

Learned counsel also submitted that another ground in the writ petition was that the cadre strength of LDA (now Assistant Reviewing Officer) was 886 at the time of

joining of respondent-petitioners, therefore, they are entitled to get their seniority within the cadre strength.

15. Submission of the learned Special Counsel for the State is that the correct facts were not placed before the learned Single Judge by the respondent-petitioners and the said petition was allowed vide order dated 21.09.2017. He also submitted that the directions given by the coordinate Bench in Special Appeal No. 31 of 2005 dated 08.05.2015 was complied in true sense by the State Government by finding out the vacancies as were available on 23.07.1990.

On 22.07.1990, cadre strength of LDA was 1259 (808 permanent + 451 temporary) and on the said date, i.e., on 22.07.1990, 578 persons were having lien against the 1259 posts of LDA. Further, 550 LDAs were officiating on the post of UDA, who were regularised on the post of UDA on 23.07.1990 in pursuance of the Rules, 1990. It has next been submitted that after giving promotion to 550 LDA on the post of UDA, available vacancies were 1231 (550 + 681).

He also submitted that 2032 persons were working on the post of LDA on 22.07.1990, out of which, 28 persons were substantively appointed persons and rest 2004 persons were working as officiating LDA. As the regular appointment was made against the said 2004 posts, but since only 1231 posts of LDA were available, therefore, on 06.08.1990, 773 temporary additional posts of LDA were created and remaining persons were also regularised. The coordinate Bench, at the time of deciding the Special Appeal No. 31 of 2005 held that the persons appointed under Rules, 1990 were direct recruittee, therefore, 1231 persons are entitled to get their seniority from 23.07.1990 and rest of the persons, i.e., 773 are entitled for their seniority since 06.08.1990. He also submitted that the respondent-petitioners came in the cadre later, therefore, they are entitled their seniority from the date of their substantive appointment. He also conceded the facts that 773 persons, those were regularly appointed under the Rules, 1990 are entitled their seniority from 06.08.1990 as prior to the availability of the posts, seniority cannot be given. He also submitted that temporarily created posts vide Government Order dated 06.08.1990 are validly counted within the cadre of LDA till the merger of all the persons within the regular cadre, i.e., 1259. He also submitted that direction of learned Single Judge in relation to the opening of issue of regularisation of persons appointed on the post of LDA under Rules, 1990 dated 23.07.1990, is contrary to the judgment of the coordinate Bench and the regularisation cannot be opened when the decision of coordinate Bench dated 08.05.2015 has already been upheld by the Hon'ble Apex Court. Therefore, the judgment passed by the writ court, which is under challenge, is liable to be set aside.

16. Learned special Counsel for the appellants also submitted that the 773 posts of LDA created vide Government Order dated 06.08.1990, are cadre posts. In support of his argument, he relied on the decisions of the Hon'ble Apex Court in the cases of **J.S. Yadav Vs. State of U.P. & Anr., (2011) 6 SCC 570 and Union of India Vs. Puspa Rani, (2008) 9 SCC 242.** He also drew attention of this Court on Rule 9(22) of U.P. Fundamental Rules, 1987, that defines the "permanent post' as a post carrying a definite rate of pay sanctioned without limit of time.

He next submitted that a person is entitled to reckon his seniority from the

date of his substantive appointment. To substantiate his arguments that, in case, a person is appointed against supernumerary post, he is entitled for his seniority from the date of his substantive appointment, Dr. L.P. Mishra placed reliance on the judgments of the Hon'ble Apex Court in the cases of **Pramod Kumar Trivedi Vs. State of U.P., 2012 (11) ADJ 253, Union of India & Anr. Vs. Dr. Akhilesh Chandra Agarwal, (1998) 4 SCC 107, Dr. D.K. Reddy & Anr. Vs. Union of India & Ors., (1996) 10 SCC 177.**

17. Learned counsel appearing for the appellants in the connected appeals also adopted the arguments advanced by Dr. L.P. Mishra, learned Special Counsel appearing for the State.

18. Shri Apoorva Tiwari appearing on behalf of the respondent-petitioners, on the other hand, submitted that there is no illegality in the order dated 21.09.2017 passed by the learned Single Judge.

Placing reliance on the judgments of the Hon'ble Apex Court in the cases of **Rajasthan State Industrial Development & Investment Corporation Vs. Subhash Sindhi Cooperative Housing Society, (2013) 5 SCC 427 and N. Ramachandra Reddy Vs. State of Telangana, (2020) 16 SCC 478**., learned counsel for the respondent-petitioners submitted that if substantial justice has been done between the parties, no interference is needed.

He further submitted that before issuing seniority list, availability of vacancies prior to the enforcement of the Rules, 1990 were not calculated in the form of separate chart. He also submitted that it is undisputed that the respondent-petitioners were appointed during the period 1996-1999 in accordance with the Rules, 1942.

19. Placing the facts of the case, in his way, Shri Apoorva Tiwari submitted that in the year 1988, the cadre strength of LDA was 1259 (808 permanent + 451 temporary) and against the aforesaid 1259 posts, 460 persons were substantively working as LDA. The Government of U.P. has given the officiating promotion to persons initially appointed on the post of Typist, Telephone operator, Telex Operator/Junior Grade Clerk to the post of LDA. In the similar manner, persons working substantively on the post of LDA were allowed to work in the officiating capacity on the post of UDA. Thereafter, in order to regularise the officiating promotion, the State Government promulgated the Rules, 1990.

Rule 3(2) of Rules, 1990 defines the term "available vacancy", which means a vacancy in which, no candidate has been recommended by the Commission before the date of notification of these Rules, which means that before the notification of Rules, 1990, no such candidate ought to be recommended by the Commission for the post of LDA. Rule 4(1)(ii) of Rules, 1990 provides that any person appointed on regular basis on the post of Typist, Telephone operator, Telex Operator/Junior Grade Clerk and subsequently promoted in an officiating capacity to the post of LDA before 01.04.1989 and continuing on the said post, shall be considered for regular appointment to the post of LDA. Rule 4(3) of Rules, 1990 prescribes the constitution of Selection Committee for considering appointment. The Selection Committee, so constituted, has to consider the names of the candidates mentioned in the eligibility list prepared as per Rule 4(4) and prepare a select list and forward the same to the Appointing authority. The Appointing authority, in turn, is required to make

appointment from the select list prepared by the Selection Committee.

20. Submission of the learned counsel for the respondent-petitioners is that no effort was made by the State Government to ascertain available vacancy, as defined in Rule 3(2) prior to implementation of Rules, 1990. He also submitted that only the posts, against which, appointments could have been made under Rules, 1990, are those which were vacant on 22.07.1990. It has vehemently been submitted that the State Government acted in arbitrary and illegal manner, i.e., neither prepared eligibility list nor constituted Selection Committee, as provided in Rules, 1990 and straight away regularisation orders were issued to employees on the post of LDA on 23.07.1990 itself. Thereafter, the State Government, in exercise of powers conferred under the proviso of Article 309 of the Constitution of India promulgated U.P. Government Seniority Rules, 1991, which were given overriding effect over all other Service Rules. The said Rules were notified on 20.03.1991.

21. Shri Apoorva Tiwari next submitted that the seniority list of LDA was finalised on 24.07.1991 and 25.07.1991, wherein all the persons regularised (de hors the Rules, 1990), were placed in the seniority list without having any regard to the sanctioned strength of the cadre, which comprises 808 permanent post and 451 temporary post.

He also submitted that the State Government vide letter dated 19.03.1991 sent requisition to the Commission to make direct recruitment on the post of LDA against 61 posts. On 13.04.1994, the State Government again requisitioned 76 vacancies to Public Service Commission for direct recruitment of LDA. Thereafter, vide letter dated 18.11.1994, the State Government, in consultation with the Commission, divided the aforesaid 76 vacancies and added 30 vacancies, out of aforesaid 76 vacancies, to 61 vacancies for which requisition was already sent on 19.03.1991. Shri Tiwari submitted that due to this exercise of the State Government, the position, which emerged out, was that 91 vacancies became subject matter of U.P. Secretariat Upper/Lower Division Clerk Examination, 1991 and remaining 46 vacancies became subject matter of U.P. Secretariat Upper/Lower Division Clerk Examination, 1995. The respondent-petitioners were selected and appointed on the post of LDA against the said U.P. Secretariat Upper/Lower Division Clerk Examinations, 1991 & 1995.

22. It has next been submitted by the learned counsel for the respondent-petitioners that the final seniority list was published on 02.11.2000 and the objections to the same were rejected vide order dated 21.11.2000. The said seniority list dated 02.11.2000 along with consequential order dated 21.11.2000 was quashed by the writ court in Writ Petition No. 6012 (S/S) of 2000 vide order dated 06.08.2004. The State Government challenged the said order dated 06.08.2004 in Special Appeal No. 31 of 2005, which was allowed on 08.05.2015.

23. Shri Apoorva Tiwari, while justifying his argument that the learned Single Judge has rightly set aside the seniority list dated 08.09.2015 vide order dated 21.09.2017 (impugned in the present appeal) submitted that the said seniority list dated 08.09.2015 was issued without considering the direction issued by the Division Bench in Special Appeal No. 31 of 2005 dated 08.05.2015 as also by

ignoring the vacancies, which arose in the year 1988, 1989, 1990, 1991, 1992, 1993, 1994 and 1995. He further submitted that the respondent-petitioners have wrongly been placed in the seniority list by altering their substantive appointment to 2000-2001.

He also submitted that persons working against 773 supernumerary post could not be placed in the seniority list as these are ex-cadre posts. He next submitted that in pursuance of the order dated 21.09.2017, seniority list dated 28.05.2018 has been issued, in which they categorically admitted that on 22.07.1990, 681 posts of LDA were vacant, but the State Government appointed 2004 LDA on 23.07.1990 under the provisions of Rules, 1990. He also submitted that the impugned order of the writ Court is not be read as statue, rather it must be read reasonably and in its entirety.

In support of his argument, Shri Apoorva Tiwari relied on the judgments of the Hon'ble Apex Court passed in the cases of **Prem Singh Vs. State of Haryana, (2009) 14 SCC 494 and Goan Real Estate and Construction Ltd. Vs. Union of India, (2010) 5 SCC 388.**

It has, thus, been submitted that there is no illegality in the order passed by the learned Single Judge and the present appeal is liable to be dismissed.

24. Learned counsel for the intervener while adopting the arguments advanced by Shri Apoorva Tiwari, submitted that the persons appointed on the ex-cadre post cannot be entitled for seniority in the regular cadre. Therefore, there is no illegality in the order passed by the learned Single Judge.

25. We have considered the arguments advanced by the learned counsel for the parties and perused the record.

26. Insofar as the argument advanced by Shri Apoorva Tiwari, learned counsel for the respondent-petitioners that if the substantial justice has been done between the parties, then interference would not be made on technical pleas, is concerned, the same has no legs to stand and is hereby rejected, as admittedly, the issue regarding the regularisation/appointment of LDA under Rules, 1990 has already been decided by the coordinate Bench vide order dated 8th May, 2015 and the same cannot now be reopened, as has been directed by the writ Court vide impugned order dated 21.09.2017.

In view of above, the decisions of the Hon'ble Apex Court relied on by the learned counsel for the respondent-petitioners in the cases of **Rajasthan State Industrial Development & Investment Corporation** (supra) and **N. Ramachandra Reddy Vs. State of Telangana (supra)** are not applicable in the present case.

In an intra-court appeal, the scope of inquiry is limited. In the present appeals, the judgment of the learned Single Judge is challenged before this Court on the ground that whether the issue of regularisation/direct appointment of the persons appointed under the provisions of Rules, 1990 can be reopened or not.

27. It is evident that the Ministerial Staff of U.P. Secretariat was being regulated in accordance with the provisions of U.P. Secretariat Ministerial Staff Rules, 1942. It is undisputed that Typist, Telephone Operator, Talex Operator, Typewriter Mechanic and Junior Clerks working on substantive post were allowed to officiate as LDA from 1st April, 1989. It is also evident from the record that total sanctioned strength of LDA was 1259, i.e., (808 permanent and 451

temporary). On 22.07.1990, against the said 1259 posts of LDA, 578 persons were having lien on the post of LDA, out of which, 550 LDA were officiating on the post of UDA and in pursuance of Rules, 1990, they were regularised on the post of UDA. On 23.07.1990, after giving promotion to 550 LDA to the post of UDA, the available vacancies for LDA were 1231. As on 22.07.1990, 2032 persons were working on the post of LDA, out of which, 28 persons were regularly selected persons and rest 2004 persons were working as officiating LDA. As on 23.07.1990 1231 posts of LDA were available after regularizing 550 LDAs on the post of UDA, therefore, regular appointments of 2004 persons officiating as LDA were made against the said posts. It was also found that 773 posts were not available, therefore, on 6th August, 1990, 773 posts of LDA were created. It is undisputed that on 23.07.1990, 2004 persons were appointed/regularised as LDA, but the posts of 773 LDA were created on 06.08.1990, however, the substantive appointment has been given to them since 23.07.1990. It is also evident that the total sanctioned strength of LDA was 1259, but the seniority list of 2032 LDA was prepared on 24.07.1991 and 25.07.1991. Further, as the State Government created 773 post on 06.08.1990 temporarily adding in the cadre, therefore, 773 temporary posts created on 06.08.1990 would be counted in the cadre of LDA till their abolition, which itself is mentioned in Government Order dated 06.08.1990. It is also undisputed that the respondent-petitioners were selected through Public Service Commission on the post of LDA against the requisition dated 19.03.1991 and 13.04.1994.

28. The seniority list for the post of LDA was prepared on 02.11.2000 and the aforesaid seniority list and its consequential order dated 21.11.2000 along with seniority list dated 24.07.1991 and 25.07.1991 were challenged in Writ Petition No. 6012 (S/S) of 2000. The said writ petition was allowed vide order dated 06.08.2004 and the seniority list dated 02.11.2000 and consequential order dated 21.11.2000 were quashed. The learned Single Judge vide order dated 06.08.2004 also directed to modify the seniority list published on 24.07.1991 and 25.07.1991 maintaining the quota as prescribed, i.e., at least 20% for direct recruits appointed upto 18th February, 1999 and thereafter 60% for direct recruitees and 40% for promotees or regularised promotees by applying Rule 8(2) and 8(3)(i) of Seniority Rules, 1991. Writ court also directed to provide prescribed quota for each selection year and also to promote them from the date their juniors had been promoted, with consequential benefits.

Aforesaid judgment dated 06.08.2004 was challenged in Special Appeal No. 31 of 2005 by the State Government. A coordinate Bench of this Court allowed the said appeal vide order dated 08.05.2015 and upheld the validity of Rules, 1990 and appointment of 2004 persons as LDA vide order dated 23.07.1990 under Rules, 1990 was also upheld, declaring them as direct recruits. It was also observed by the coordinate Bench that on 23.07.1990, 2032 persons were working on the post of LDA and the substantive vacancies available were 1259, therefore, with the intention to accommodate 773 persons, vide Government Order dated 06.08.1990, 773 temporary posts of LDA were created. Para 2 and 3 of the Rules, 1990 provides that aforesaid vacancies are temporary posts in the cadre of LDA upto 28th February, 1991 and after absorption of

the persons appointed on the aforesaid created 773 posts, in the regular cadre, the said posts will not be filled up in future.

Relevant parts of judgment dated 08.05.2015 are being reproduced hereunder:

"In order to calculate the vacancy, therefore, one will have to go back to the availability of the vacancy prior to the enforcement of the said rule which vacancies have to be such so that a person can claim his substantive appointment against such vacancy. The reason is that seniority would be given only from the date of substantive appointment against such a vacancy. This determination for all such candidates who have been regularised will therefore have to be made by preparing a separate chart indicating as to how and when the vacancy became available.

This is necessary as the vacancies came to be created vide Government Order dated 6.8.1990 apart from the vacancies which were existing. The first thing therefore to be done is as to which were the vacancies that were available on 23.7.1990. So far as their subsequent adjustment is concerned, the same can only be from the date any vacancy is made available. This peculiar situation has arisen because of the fact that the regularisation rules have been enforced even prior to the declaration of the vacancies on 6.8.1990 which do indicate the dates from which they have been made available to the incumbents. The question is that the available vacancy has to be against such a vacancy for which no candidate had been recommended by the Commission before the notification of the Rules. The criteria therefore again will have to be as to whether the vacancy was available so as to cover the regularised appointments envisaged under the notification dated 23.7.1990. It is only then that seniority can be claimed by the incumbent under Rule 46 of the 1942 Rules read with Rule 7 of the 1990 Regularisation Rules and the 1991 Rules of Seniority from the date of substantive appointment. This determination does not appear to have been done from a perusal of the impugned seniority list dated 2.11.2000 and the rejection of the representation on 21.11.2000. Consequently, the seniority will have to be redetermined by following this criteria and explicitly indicating the facts as per the aforesaid criteria separately. This calculation therefore from the date of the entry in the cadre as per available vacancy has to be revisited as it does not appear to have been done by the appellant-State. At least the same does not appear to be clear either from the impugned lists or orders or from the counter affidavit filed on behalf of the State before the learned Single Judge.

Apart from this, neither the learned Single Judge has touched this issue of providing seniority from the date of entry into the cadre nor has the division bench judgment dated 2.7.1996 taken notice of the aforesaid rules for determination of seniority in respect of the Upper Division Assistants. However, even though the dispute of Upper Division Assistants has attained finality, yet this aspect in relation to Lower Division Assistants was neither considered therein nor has it been determined by the State Government as indicated above. Consequently, the determination accordingly is an exercise which will have to be undertaken for resolving the dispute between the respondent-petitioners and those who have been regularised under the 1990 Rules.

There is one more aspect which has to be adopted while determining seniority,

namely, the determination of seniority on account of the U.P. Government Servant Seniority Rules, 1991 coming into force. This is necessary because the said Seniority Rules of 1991 came into effect from 23.3.1991 and the seniority lists were prepared initially on 24.7.1991 and 25.7.1991. Thus, the Seniority Rules had come into force by the time the seniority list had been issued. Consequently, the impact thereof has also to be taken into account as the provisions of reservation or of any other criteria mentioned in the said rules could not have been ignored. The candidates who came to be appointed on substantive basis after 23.3.1991, their seniority would be governed by the 1991 Rules as they have an overriding effect over all other rules of seniority. This aspect has also escaped notice of the learned Single Judge for modulating the seniority in terms thereof.

Accordingly, the State Government will now have to undertake an exercise in the light of the aforesaid principles and redetermine the seniority as they would have an impact on the consequential benefits to which the respondent-petitioners may be entitled or their adversaries would be entitled as a result of such determination.

Having regard to the reasons given by us hereinabove, the position that emerges is:-

1. That the writ petitioners did have a cause of action as their objections vis-a-vis the seniority of those LDAs' who were regularised vide order dated 23rd July, 1990 against posts created on 6.8.1990, adversely affected the respondent-petitioners with the promulgation of the seniority list on 2.11.2000 and the rejection of the representation on 21.11.2000. We further hold that the petition of the respondent-petitioners is not barred by laches for all the reasons recorded hereinabove nor have they delayed the filing of the writ petition as the cause of action arose to them only after the lists and orders were issued on 2.11.2000 and 21.11.2000 respectively.

2. The division bench judgment dated 2nd July, 1996 in the case of U.P. Secretariat, UDA Association and 7 others Vs. State of U.P., Writ Petition No. 6200 of 1993 as affirmed by the Supreme Court in the decision in Special Appeal No. 25086 of 1996 decided on 27.1.1997 by the Apex Court and reported in 1999 (1) SCC 278; U.P. Secretariat UDA Association Vs. State of U.P. and others has attained finality as in relation to Upper Division Assistants, subject to the direction issued by the Apex Court to the effect that promotees are also required to be fitted into service from the date when they are entitled fitment in accordance with the quota and rota prescribed under the rules, but at the same time the said judgment would not be an impediment for the reasons given in our judgment hereinabove for determining the limited issue of seniority of the Lower Division Assistants.

3. The status of the employees who have been regularized under the Regularization Rule dated 23rd July, 1990 and have been appointed under the post creation order dated 6th August, 1990 are not promotees and can only be treated as direct recruits for the reasons given in the judgment hereinabove. The presumption raised and the finding recorded by the learned Single Judge to that extent stands reversed.

4. In view of our findings and conclusions that the candidates who fall under the Regularization Rule of 1990 are not promotees and are direct recruits, there is no reason to apply the quota and rota rule for promotees for them.

5. For the reasons given by us hereinabove, we also hold that the State Government has not been able to establish about any exercise of having undertaken for determining the vacancies under Rule 11 of the 1942 Rules as per the cadre strength defined under the rules. This exercise will also have to be undertaken to first determine the vacancies that are available in Rule 3(2) of the Regularization Rules of 1990 in order to determine as to whether the appointments by way of regularization have been offered against the substantive vacancies available with regard to which no candidate had been recommended by the Commission before the notification of the said rules on 23rd July, 1990. The argument of the learned counsel for the respondent-petitioners that in order to claim seniority those who have been regularized, their induction into the cadre and date of entry upon being appointed in a substantive capacity against a substantive vacancy has to be determined before extending to them the benefit of seniority, is accepted.

6. For this the status of post creation or availability of the post in the cadre, the vacancies determined as per rules and then the placement according to the date of substantive appointment will have to be determined.

7. So far as those who have been extended the benefit of 15% promotion from the post of Group-D/Class IV Employees, their status stands determined by the introduction of sub-rule (4) of Rule 14 of the 1942 Rules as introduced on 5.11.1990 and therefore they have to be allocated their space as per their appointment under the aforesaid provision.

In view of the conclusions drawn hereinabove and the reasons in support thereof, we allow Special Appeal No. 31 of 2005 and set aside the judgment dated 6th August, 2004 but at the same time we also grant relief to the writ petitioners to the extent of allowing the writ petition and quashing the final seniority list dated 2nd November, 2000 as well as the rejection of the representation of the writ petitioners vide order dated 21st November, 2000. All consequential action taken pursuant to the judgment dated 6.8.2004 would also stand annulled including the seniority list dated 21.10.2005.

As a consequence of the aforesaid relief having been extended, we further clarify that the seniority list of the Lower Division Assistants shall be redetermined in the light of the observations made hereinabove and the principles that have been spelled out in this judgment as well as the rules and regulations applicable as per the law prescribed and after the exercise is completed, the list of 24.7.1991 and 25.7.1991 would stand modified accordingly if necessary as a fall out of such exercise. This exercise shall be undertaken by the State Government and concluded preferably within a period of three months and till such exercise is concluded no fresh third party rights should be created till finalization of the seniority as per this judgment. So far as the consequential action taken by the State Government pursuant to the impugned judgment dated 6th August, 2004 is concerned, since the judgment has been set aside, any action taken on the strength thereof also falls through."

29. From a further perusal of the judgment of the coordinate Bench dated 08.05.2015, it is evident that the arguments advanced by the learned counsel for the respondent-petitioners before this Court have already been placed before the coordinate Bench and all these issues in relation to regularisation of the persons in

compliance of the Rules, 1990 as also the LDAs appointed through Public Service Commission have already been considered and decided by the coordinate Bench in the following terms.

"Sri Anil Tiwari, learned Senior Counsel assisted by Sri Apoorv Tiwari has advanced his submissions on behalf of the respondent-petitioners contending that the entire thrust of the argument of the State Government primarily is that the rules, namely the Uttar Pradesh, Secretariat Ministerial Staff Rules, 1942 do not make any provision for promotions and therefore the concept of promotion is alien to the said rules.

Sri Tiwari submits that the State has taken a stand as if the appointments made by the State, the seniority whereof was in dispute before the learned Single Judge was not by promotions and were alternate modes of recruitment, but he submits that the pleadings in the counter affidavit of the State are otherwise. The argument which is being advanced by Sri Prashant Chandra for the State is therefore not in conformity with the pleadings. He however submits that in essence if the rules are read together then there are only two modes of recruitment, one that is direct recruitment and the other modes are recruitments which are not direct recruitment, and therefore are according to him nothing else but promotions. For this he has invited the attention of the Court to Rule 2(f) of the 1942 Rules, extracted hereinunder:-

"2(f) "Direct recruitment" means recruitment made otherwise than by promotion"

The said rule defines direct recruitment to mean recruitment made otherwise than by promotions. Sri Tiwari submits that the word promotion therefore occurs in the 1942 Rules in contradistinction to direct recruitment and therefore the same is clearly referable to the other alternate modes of recruitment of departmental candidates who have been extended the benefit by the State Government. He therefore submits that the State Government cannot now say that they were not promotions. He has further pointed out the definition of the meaning of the word staff which means the entire cadre of non-gazetted ministerial staff of the Secretariat. The cadre of the staff has been defined in Rule 3.

Elaborating his submissions, Sri Tiwari submits that for this further reference will have to be made to Rule 14 of the 1942 Rules which is extracted herein under:-

"Rule 14. Reservation of vacancies in the posts of Lower Division Assistants in special circumstances-

(1) * * * *

(2) The appointing authority may, in special circumstances but not generally, and with the concurrence of the Commission, reserve in any year up to eighty per cent of the total number of permanent vacancies intended to be filled in that year, for departmental candidates who have rendered temporary or officiating service in the said or higher post for such total period as may be fixed in that behalf in consultation with the Commission and whose work is considered by the appointing authority to be satisfactory. The vacancies so reserved may be filled on the basis of a qualifying examination to be conducted by the Commission, from amongst candidates who come up to such standard as is considered by the Commission to be reasonable. There shall be no upper age limit for such candidates either for their appearance at the said qualifying examination, or in the event of their success at that examination, for their

appearance on equal terms with the candidates for direct recruitment at any subsequent competitive examination referred to in rule 5 in respect of the posts of Lower Division Assistants.

(3) Notwithstanding anything contained in rule 14(2) or in any other rule, the appointing authority may, having regard to the exigencies of Public Service, fill in existing permanent vacancies in the posts of Lower Division Assistants to the extent of 80 per cent from such departmental candidates who were recruited in previous years through the Commission against temporary vacancies or those recruited on the basis of a qualifying examination and who have completed at least one year's temporary or officiating service on the post of a Lower Division Assistant or on a higher post and whose record of service is considered to be satisfactory."

He contends that reservation of vacancies is contemplated under the said rule for departmental candidates for recruitment/appointment to the post of Lower Division Assistants. This is available to only such candidates who have rendered temporary or officiating service on the said post or higher post for a certain number of period that may be fixed by the appointing authority in consultation with the Commission.

Sri Tiwari therefore submits that this nature of reservation of 80% of the total number of permanent vacancies of Lower Division Assistants is clearly meant for inhouse candidates and for those who are already in service of the Secretariat. The provision therefore is to offer them a higher post keeping in view the fact that they shall be entitled and eligible for consideration provided they fulfill the conditions prescribed therein which also includes the consideration of the candidate after he appears in a qualifying examination to be conducted by the U.P. Public Service Commission. He has further pointed out that no upper age limit is provided for such candidates and therefore it is clear that the entire rule is for providing benefit of higher avenues in service which is nothing else but a mode of promotion and is not a mode of direct recruitment or any other alternate mode of recruitment. He submits that upon fulfilling the conditions, the person working in the lower grade gets a transition in service the consequence whereof is eventual promotion to a higher post. He contends that it is something different that the procedure prescribed for such promotion is through the commission but the same is not direct recruitment which envisages a different procedure under Rule 5 of the 1942 Rules. He submits that Rule 2(f) read with Rule 5(B)(4) clarifies the position that direct recruitment is by competitive examination to be conducted by the Commission whereas for the departmental candidates a qualifying examination is to be conducted by the Commission from amongst such candidates who have rendered temporary or officiating service for a particular period as defined under Rule 14(2) referred to hereinabove. This therefore takes such recruitment through reservation of vacancies totally outside the purview of direct recruitment and by exercise of such discretion in special circumstances the State Government is empowered to make promotions.

The argument therefore appears to be that the seniority of such persons, which is being contested by the respondent-petitioners, and who were appointed by the State Government not by direct recruitment but by other methods have to be treated as promotions. He however submits that such recruitment is possible only after

permanent vacancies are determined to be filled in that year as per the determination of number of vacancies under Rule 11 that has to be made annually to be filled up either through examinations or selection as the case may be, but without determining such vacancies the post cannot be reserved or offered to a departmental candidate.

He further submits that mere selection under the rules does not give any right of appointment unless the provisions of Rule 19 are also observed which provides that the appointing authority after such consideration under Rule 12, Rule 13 or Rule 14 as well as Rule 24 which are the other modes of recruitment have to be subjected to an inquiry and after a satisfactory opinion is formed in respect of such candidates then only he will be considered to be qualified or else he will be disqualified for appointment. He further contends that this two fold scrutiny of first examining the standard of the candidate amounts to judging his merit under Rule 14 through a qualifying examination and the second stage is of considering his suitability in terms of Rule 19(2). Such a rule is akin to the rule of merit-cum-seniority which is applied for promotions. He therefore submits that this procedure as well indicates that the other modes prescribed under Rule 12, 13, 14 and 24 are modes of promotion to a higher post keeping in view the peculiar nature of services of the Civil Secretariat. For this he submits that the Secretariat Establishment is a separate establishment of a peculiar nature and they are attached to an establishment from where they cannot be transferred or sent to any other place and rather they have to virtually stagnate in the same establishment. It is for this reason that the merit of suitable candidates are to be assessed for offering higher posts through reservation as defined aforesaid which clearly amounts to offering them advancements in their career and which procedure is nothing short of promotion. The LDA's, whose seniority is being assailed by the respondent-petitioners, have actually been given the benefit of promotion.

He has then invited the attention of the Court to Rule 24 which is again a reservation of vacancies in the post of Lower Division Assistants of a special category in relation to Telephone Operators, Junior Grade Clerks and approved candidates on the waiting list of these posts. Here Sri Tiwari advanced a separate argument that under Rule 24 it is obligatory on the State to carry out this exercise and to offer appointment by reserving one vacancy if the posts in every alternate year of recruitment as provided in the said rule. He therefore submits that this is yet another mode but which was never adopted by the State Government inspite of a specific obligation cast on the State Government for doing so.

He has then invited the attention of the Court to Rule 34 which makes a provision for waiting lists. Here he submits that there shall be two types of waiting lists, one being the list of departmental candidates qualifying separately under Rule 12, Rule 13, Rule 14 and Rule 24 and then a combined list of all such candidates to be a waiting list which according to him would be available to offer appointments on the higher post of LDA as and when the vacancies come into existence.

Appointment is provided for under Rule 35 which has to be in order in which the names of candidates stand in the list of selection or the waiting list as the case may be.

When it comes to seniority under the 1942 Rules the provision is clear that it shall be determined in the class to which

one is appointed by the date of his substantive appointment and in the case of more than one person appointed on the same date according to their respective positions in the waiting list. Rule 46 is quoted hereinunder:-

"Rule 46. Seniority - The seniority of a member of the staff shall ordinarily be determined in the class to which he is appointed by the date of his substantive appointment and in the case of more than one person appointed in the same date according to their respective positions in the waiting list.

Provided that the seniority of such members of the staff as were holding substantive appointments in the Government Estate Department immediately before April 1, 1965 shall in consequence of the merger of that Department will the Uttar Pradesh Secretariat be determined in such a manner that for every two years of service rendered by them in a substantive capacity in that Department before the said date, they shall be allowed the benefit of one year's substantive service, and their seniority vis-a-vis the other members of the staff shall be fixed accordingly."

The contention therefore is that the candidates who are appointed otherwise than through direct recruitment and are internal departmental candidates, have to be considered as promotees and their appointment if made in terms of 1942 Rules, would be treated as a substantive appointment if the same has been done in conformity with the said rules. On the other hand, if any promotion has been made without following the said rules, then a person would not be treated to be substantively appointed so as to form part of the cadre and claim consequential seniority.

To substantiate his submissions that the rules indicate promotional avenues and any attempt made to give a higher post amounts to promotion, Sri Tiwari has cited the following judgments:-

1.1971(2) SCC 58 (Para 11); Dr. Harkishan Singh Vs. State of Punjab and others;

2.1980 Supp. SCC 668 (Para 5); C.C. Padmnabhan and others Vs. Director of Public Instructions and others;

3.1994 Supp (3) SCC 595 (Para 6); Director, Central Rice Research Institution, Cuttack and another Vs. Khetra Mohan Das;

4.(1994) 5 SCC 392 (Paras 5 and 9); Tarsem Singh and another Vs. State of Punjab and others;

5.1994 Supp (1) SCC 44 (Para 6); K. Narayanan and others Vs. State of Karnataka and others;

6.(1995) 4 SCC 462; Union of India Vs. S.S. Ranade

7.1996 (1) SCC 562 (Paras 7 and 8); State of Rajasthan Vs. Fateh Chand Soni;

8.(1999) 7 SCC 251 (Paras 6 and 15); Ram Prasad and others Vs. D.K. Vijay and others.

The aforesaid judgments have been cited in support of the proposition that whenever a higher post or a higher pay scale is offered to an in house candidate, the same amounts to promotion.

These judgments therefore reflect on the concept of promotion as an advancement in career to a higher post or a higher pay scale. With the aid of these judgments, Sri Tiwari submits that the rules of 1942 which provide for other modes of recruitment as discussed hereinabove, other than direct recruitment, are clearly designed to promote the internal departmental candidates.

Sri Tiwari thereafter has advanced his submissions in relation to those 2034

candidates who have been absorbed under the Uttar Pradesh Secretariat, Upper Division Assistants and Lower Division Assistants (Regularization of Officiating Promotions) Rules, 1990 contending that the regularisation is by way of promotion. This rule and offer of regularization to such employees whose seniority is the bone of contention between the respondent-petitioners and the State has been framed in exercise of powers conferred under Article 309 of the Constitution of India. The rules were notified on 23rd July, 1990. According to Rule 2 thereof, they shall have effect notwithstanding to the contrary contained in any other rules or orders but at the same time Rule 3(6) defines that service rule means the Uttar Pradesh Secretariat Ministerial Staff Rules, 1942. Thus, even though an overriding effect has been given to such rules, but they refer to the 1942 Rules.

Sri Tiwari contends that regularization was offered to such persons who were officiating in higher posts and were described as having been promoted in officiating capacity. They were however to be considered for regular appointment and according to Rule 4(3) a Selection Committee consisting of three officers was to be constituted for selecting such candidates and then preparation of an eligibility list for considering appointment after assessing their suitability. The select list was to be prepared by the Selection Committee.

The rules further provide that such appointments shall be considered for regular appointment against permanent or available temporary vacancies under Rule 4. The word available vacancy has been defined in Rule 3(2) to mean such a vacancy for which no candidate had been recommended by the Commission before the date of notification of these rules. This clearly means that any vacancy, permanent or temporary existing as per cadre strength under 1942 Rules, would be offered for regular appointment provided such vacancies have not been notified or recommended by the Commission before the date of notification of the said rules. What therefore follows is if the Commission has not recommended any candidate for any such vacancy then only regularization would be offered against such a post. Sri Tiwari submits that the vacancy has to be available before hand. The vacancy according to him has to be determined as per Rule 11 of the 1942 Rules or otherwise should also exist prior to the notifications of the rules of regularization on 23rd July, 1990. It is only thereafter that the Selection Committee would proceed to consider any candidate and it is only after such selection that the appointment can be deemed to be an appointment under the service rule as per Rule 6. He further points out that Rule 7 of the 1990 rules also demonstrates that seniority would be available in accordance with service rules and interse seniority of the candidates would be the same as it was in the cadre from which they were promoted on an officiating basis.

The contention of Sri Tiwari is that even this procedure under the 23rd July, 1990 notification was not followed nor was it observed and all regularization which followed as a consequence of the said notification is invalid. He submits that since the said rules also provide for a clear rule of seniority to be adopted for such candidates, the same can always be questioned and can be adjudicated by this Court even at the instance of the respondent-petitioners who were born later in the cadre. This can be done, inasmuch as, if any illegal appointment de-hors the rules and contrary to the cadre strength has

been made, the same would not confer any entitlement at least to claim seniority over and above the direct recruits.

He also contends that such appointees will be deemed to be in service only if appointments can be saved lawfully and if the appointments cannot stand the scrutiny of the rules under which such appointments have been made such candidates have to be pushed down for the purpose of seniority as against direct recruits.

The contention of Sri Tiwari is that even for the purpose of being born in the promotion cadre the appointment has to be as per the cadre strength and the vacancies available as indicated above and the appointments should be in accordance with the rules. If both these contingencies are absent, then if the appointment is beyond the cadre strength the person would not be entitled to any such benefit unless he enters the cadre as and when the vacancies are available. The State Government did not undertake any such exercise and rather thrust upon the cadre these 2034 candidates without there being any posts available. In such circumstances, he contends that the issue of delay in challenging the seniority awarded to such candidates would not impede the challenge raised on behalf of the respondent-petitioners.

To demonstrate that the vacancies were not available, he has invited the attention of the Court to Paras 7 and 8 and other paragraphs of the counter affidavit filed on behalf of the State on 11th January, 2000 the affidavit whereof is sowrn by Sri Dhirendra Pratap Singh. He submits that there the cadre strength has been described and the figures given therein are totally incorrect and false. He submits that no determination of vacancy was undertaken under the 1942 Rules that could have been offered to such reserved category of internal candidates and realizing that no such exercise has been undertaken, the State Government hurriedly in a very novel manner introduced and notified the Rules dated 23rd July, 1990 which is neither in conformity with the 1942 Rules nor is it in conformity with law. Otherwise also assuming that the said rules notified on 23rd July, 1990 do confer some rights the same has been followed in its utmost breach. The contention is that at one place the cadre strength is described as 886 and another place the same swells to 1100 or odd. He therefore submits that even if these figures are admitted it is not understood as to how 2034 candidates have been extended the benefit of regularization. He further submits that the description of creation of 773 supernumerary posts in the counter affidavit does not spell out as to when these posts were so created. It is at this juncture that it is relevant to mention that the appellant State has placed before us the notification dated 6th August, 1990 indicating the existing and the posts that have been created and described as supernumerary posts in the counter affidavit.

The argument therefore is that having failed to determine the correct number of vacancies and there being no posts available on 23rd July, 1990, the entire process of regular appointment on the same date that is 23rd July, 1990 is totally illegal and therefore it cannot confer any status on such appointees to claim seniority as they are not part of the cadre. Even otherwise, the word supernumerary used in the counter affidavit itself is indicative of the fact that they are posts beyond the cadre and therefore seniority would be available only for such candidates who are within the cadre and not against supernumerary posts. It has however been clarified by Sri Sudeep Seth at this stage that the word supernumerary appears to have been

loosely used in the counter affidavit whereas the notification dated 6th August, 1990 creating the posts clearly describes them to be temporary posts and therefore they be treated accordingly and not as supernumerary posts.

Sri Tiwari taking a dig at this stand of the State submits that this fact of the creation of the posts subsequent to the notification dated 23rd July, 1990 was neither placed before the learned Single Judge nor has the learned Single Judge taken notice of this fact but he has rightly arrived at the conclusion that the seniority deserves to be redetermined treating them to be promotees.

Sri Tiwari contends that if the posts itself were created much after 23rd July, 1990, then no benefits accrue to any of the appointees as the word "available vacancy" is that for which no candidate had been recommended by the Commission before the date of notification of the rules. In the instant case, the notification dated 6th August, 1990 establishes that there were no posts available except the permanent nature of posts indicated therein which was also not determined as per Rule 11. In this unsure state it is obvious that at least the 773 additional posts that came into existence for the first time on 6.8.1990 were not there for being offered for appointment when the regularisation rules were promulgated on 23.7.1990. Not only this, the said post creation order also clearly prescribes that these appointees would be in addition to the cadre strength and the posts would stand abolished as and when the appointees enter a particular cadre.

Sri Tiwari therefore contends that it is only as and when such candidates enter the cadre that they would be entitled to count their seniority from such date and not from the date of their alleged regular appointment on 23rd July, 1990. In this background, even though the respondent-petitioners have been appointed through direct recruitment later on between 1997 and 1999, yet they can challenge their placement in seniority as against such candidates who are not even part of the cadre and admittedly their status is beyond the cadre strength as indicated hereinabove.

Sri Tiwari submits that under the 1990 Rules dated 23.7.1990 these persons may have been appointed and their appointment may not be open to challenge but they have been kept alive without being born into the cadre, particularly the 773 candidates who have been referred to hereinabove. He therefore submits that the question of seniority hinges upon the very factum of mode of a person entering into the cadre through a regular appointment in accordance the rules against available vacancies. Any illegal action of the State Government cannot enure any benefit on such appointees as that would be putting a premium on the government's illegal action. Such appointees according to Sri Tiwari will continue to hold lien on their original posts till they are absorbed regularly into the cadre. The notification dated 23rd July, 1990 does not therefore confer any such right and this issue has to be gone into as a matter of principle by this Court as well as by the State Government before finalizing seniority. Sri Tiwary has then cited the following judgments to support his submissions:-

1.(1996) 11 SCC 361; M.S.L. Patil, Asstt. Conservator of Forests, Solarpur(Maharashtra) and others;

2.(1998) 6 SCC 630; C.K. Antony Vs. B. Muraleedharan and others;

3.(2004) 10 SCC 734; Sanjay K. Sinha-II and others Vs. State of Bihar and others;

4.(2009) 12 SCC 49; State of Rajasthan and others Vs. Jagdish Narain Chaturvedi and others.

One more contention has been raised by Sri Anil Tiwari, namely that the manner in which the selections are alleged to have been carried out on the same day, it was not possible for a selection committee to have interviewed or assessed their suitability in just one day. The State issued letters of appointment on the same date when the 1990 Regulations were promulgated."

30. It is also evident that the judgment passed by the coordinate Bench in Special Appeal No. 31 of 2005 was challenged in SLP (C) No. 23254 of 2014, which was also dismissed vide order dated 29.03.2017.

31. Vide impugned order dated 21.09.2017, learned Single Judge set aside the seniority list dated 08.09.2015. The grounds taken by the respondent-petitioners before the writ Court were that the directions issued by the Division Bench in Special Appeal No. 31 of 2005 on 08.05.2015 were not complied with at the time of preparation of seniority list, as also the Rule 9(2) of the Rules, 1991 was not considered. Further prayer made in the writ petition was to place the respondent-petitioners in the seniority list after serial no. 810.

Learned Single Judge vide impugned order dated 21.09.2017 observed that there are two aspects of service laws, which have to be separately applied in the facts of the case, one of which, is of regularisation and substantive appointment, and the other is seniority. Both are governed by separate rules and both cannot be confused and mixed with each other. It is also observed by the writ Court that an incumbent has to be regularized or appointed on a substantive vacancy, and the date on which he is regularized or appointed on a substantive vacancy, would be the relevant date for his entry in the cadre and for fixation of his seniority. Once the date of regularisation of substantive appointment in the cadre is fixed, the same cannot be changed. The seniority has to follow the said date of regularization and/or substantive appointment on a vacancy in the cadre. For the said purpose, firstly an exercise for deciding the number of vacancies available for regularization as per the Regularization Rules, 1990 ought to be calculated by the State Government. The Rules, 1990 were initiated on 23.07.1990 and on this date, the regularisation also took place. Thus, the vacancies, as per the provisions of the aforesaid Rules have to be available on 22.07.1990. Learned Single Judge further observed that on the said date, admittedly, a large number of LDAs were officiating as UDA and were occupying the post of LDA, hence, the post, they were occupying, cannot be considered as the vacant post at the time of regularisation of officiating LDA. Learned Single Judge also observed that 2032 persons were required to be regularised as LDA while the total number of posts available in the cadre was 1235 and some of which were already occupied. Thus, even the entire cadre strength was much less than the persons required to be regularised. It would also not leave any vacancy available in the year 1991 or 1994 for being requisitioned to Commission.

With the aforesaid observations, learned Single Judge set aside the seniority list dated 08.09.2015 and directed the State Government to regularise LDAs on the posts, as were available on 22.07.1990 and, accordingly, fixed their seniority on the date of their appointment in substantive vacancy as directed by the Division Bench.

The relevant paragraphs of the impugned order are reproduced hereunder :

"21. The remaining vacancies of the cadre, which were not filled up under the Regularization Rules, 1990, continued to be covered by the Rules of 1942 and any selection and appointment to such vacancies could be made only under the said Rules of 1942. The said vacancies cannot by any interpretation of law, be filled up by Regularization Rules, 1990. This interpretation is also supported by the action of the State Government itself, that it took after coming into force of Regularization Rules, 1990. The State Government by a requisition dated 19.3.1991 and 13.4.1994 itself requisitioned vacancies to the Commission for being filled up. Thus, on the said dates, the State Government was of the view that only the vacancies as existed on 22.7.1990 have been occupied by the officiating Lower Division Assistants by way of their regularization. If the argument of the respondents is accepted, then, all the vacancies available on 23.7.1990 would stand filled up and still there would be persons available, required to be regularized under the Rules of 1990. Thus there would be no vacancies available to be sent to the Service Commission in 1991. This situation would arise as admittedly there are 2032 number of persons required to be regularized as Lower Division Assistant while the total number of post available in the entire cadre is 1235 (Both 804 permanent and 431 temporary) some of which were occupied. Thus, even the entire cadre strength was much less than the persons required to be regularized. It would not leave any vacancy available in the year 1991 for being requisitioned to the Commission. The State Government did not act in that fashion. The State Government itself requisitioned vacancies to the Commission. Hence what is being argued today is contrary to the action of the State Government taken by it immediately after the Regularization rules, 1990 were given effect to.

22. In the impugned order while fixing seniority persons have been given regularization, from dates when there were no vacant substantive posts available, contrary to the Regularization Rules, 1990 and the directions of the Division Bench. Thus, the impugned order dated 8.9.2015 cannot stand and is set aside. The State Government is directed to regularize Lower Division Assistants on vacancies as were available on 22.7.1990 and accordingly, fix their seniority on the date of their appointment in substantive vacancies as directed by the Division Bench. In the remaining vacancies of the cadre, the appointments are required to be made as per Rules, 1942 and the persons so appointed under the rules, 1942 would also be given seniority on the basis of the date of their appointment on the substantive vacancies under the said Rules.

23. Thus, following directions are issued to the State Government:-

(i) The State Government shall fix vacancies available for regularization as per Regularization Rules, 1990 and the directions given by the Division Bench prior to notification of Regularization Rules, 1990 i.e., on 22.7.1990.

(ii) Thereafter, the said vacancies available are to be filled up from amongst the persons falling within the criteria of regularization under Regularization Rules of 1990 as per the direction of the Division Bench. Persons remaining to be regularized shall be kept in waiting list till the vacancies become available, within the vacancies which were found on 22.7.1990, i.e., the vacancies under which persons can be regularized as per Regularization Rules of 1990 and the order of the Division Bench.

(iii) As regards the remaining posts in cadre (the posts other than those which are vacant on 22.7.1990), and after all the persons who are to be regularized are given substantive appointments all future vacancies, shall be filled up by appointment as per Rules of 1942 as amended from time to time and after notification of U.P. Secretariat Ministerial Service Rules, 1999 vacancies will be filled under said 1999 Rules.

(iv) Thereafter the State Government is to prepare the seniority list on the basis of the date on which a person is given substantive appointment in the cadre. The seniority is to strictly follow the date of substantive appointment in the cadre.

The above two exercises are required to be held distinctly so that no further confusion is created.

24. Since the matter is old, it is expected that the State Government shall complete the exercise as per directions given above, within a period of six months.

25. With the aforesaid directions, the present writ petitions is allowed."

32. Admittedly, the coordinate Bench in Special Appeal No. 31 of 2005 while upholding the regularisation of the persons under Rules, 1990 vide order dated 23.07.1990, declared them as direct recruitees, but this fact was not properly placed before the learned Single Judge.

It is undisputed fact that total sanctioned strength of the LDA was 1259 (808 permanent + 551 temporary). 681 post of LDA were vacant and 550 LDA were working/officiating on the post of UDA on 22.07.1990. Total 28 substantive LDAs were working and rest 2004 persons were working as officiating LDA. As on 22.07.1990, 550 LDAs working/officiating on the post of UDA. They were regularised as UDA on 23.07.1990, therefore, 2004 persons, who were officiating/working on the post of LDA were also regularised as LDA on 23.07.1990 against 1231 vacant posts of LDA (including 550 posts of LDA, who were officiating as UDA and regularised on the said post on 23.07.1990). As on 23.07.1990, total vacancies of LDA were 1231, but since 2004 persons were regularised/appointed as LDA and 773 persons were regularised/appointed beyond the cadre strength, therefore, 773 post of LDA were created vide Government Order dated 06.08.1990 with the intention to give the substantive appointment to 773 LDAs by extending cadre strength temporarily.

It is also evident from the record that 773 posts were created vide Government order dated 06.08.1990, therefore, 773 persons regularised under the Rules, 1990 were entitled to get their seniority from 06.08.1990 and not before this date. Admittedly, the issue of regularisation/recruitment of 2004 persons was already decided by the coordinate Bench and the said judgment has also been affirmed by the Hon'ble Apex Court in SLP (C) No. 23254 of 2014, hence, the same cannot be re-opened. Thus, 1231 persons appointed under the provisions of Rules, 1990 read with Rules 1942 are entitled to get their seniority from 23.07.1990 and remaining 773 persons are entitled to get their seniority from 06.08.1990 after creation of post of LDA.

33. The coordinate Bench has already dealt the issue that 2004 persons appointed under the provisions of Rules, 1990 are direct recruits, therefore, they cannot be deprived from their seniority and they are entitled to get their seniority from the date when the substantive posts were made available. The aforesaid view of the

coordinate Bench finds support from the judgments of the Hon'ble Apex Court in the cases of **Pramod Kumar Trivedi (supra)**, **Union of India & Anr. Vs. Dr. Akhilesh Chandra Agarwal (supra)** and **D.K. Reddy (supra),** wherein the Hon'ble Apex Court held that a person, even appointed against a supernumerary post, is entitled to seniority from the date of his substantive appointment.

Further, all the vacancies created temporarily for recruitment of the officiating LDA, come within the cadre, as has been held by the Hon'ble Apex Court in the cases of **J.S. Yadav (supra)** and **Union of India Vs. Puspa Rani (supra)**.

As the coordinate Bench also decided the issue in relation to the validity of Rules, 1990 and appointment of the persons under the aforesaid Rules on the post of LDA, the judgment referred by the learned counsel for the respondent-petitioners in the cases of **Prafulla Kumar Das** (supra), **Union of India Vs. S. Krishna Murthy** (supra), **R.K. Sabarwhal** (supra)**, Prem Singh** (supra), **Goan Real Estate & Construction Ltd.** (supra), **Direct Recuirt Class II** (supra), **Narinder S. Chadha** (supra), **Janak Dulari Devi** (supra) and **Bharat Singh** (supra), are not applicable in the present case.

34. It is also relevant to mention here that all these arguments placed before this Court have already been dealt by the coordinate Bench and thereafter upheld the validity of the recruitment under Rules, 1990.

35. Learned counsel for the respondent-petitioners failed to advance argument on the point that as to how the issue of regularisation/appointment under the provisions of Rules, 1990 can be reopened, when the same has already been adjudicated and declared valid by the coordinate Bench in Special Appeal No. 31 of 2005. All the issues raised by the respondent-petitioners here in the present appeal as also in the writ petition, have been dealt by the coordinate Bench in its judgment dated 08.05.2015, in detail, which are reproduced hereunder :

The first question that has to be addressed to is the maintainability of the writ petition filed by the respondent writ petitioners challenging the seniority accrued in favour of those LDAs, who were extended the benefit of the Regularization Rules dated 23rd July, 1990. This is admitted that the respondent writ petitioners were born into the cadre between 1996 to 1999. Thus, when the said rules were promulgated and the benefit of regularization was given under the rules dated 23rd July, 1990 coupled with the post creation orders on 6.8.1990, the respondent-petitioners having not been born into the cadre, did not have any occasion to raise any such challenge. This does not mean that they are precluded from raising a challenge to the seniority, if it affects them as and when they enter into the cadre. At this juncture, one of the arguments advanced by Shri Prashant Chandra deserves mention. His contention is that unless the very regularization order dated 23rd July, 1990 is challenged, the consequential seniority of such candidates also cannot be challenged. For this, it is on record that there was no challenge raised to the regularization order dated 23rd July, 1990 by the respondent writ petitioners. They, after the disposal of the writ petition and the pendency of the present appeal filed by the State for four years in 2008 filed an amendment application seeking to challenge the said regularization order on

the ground of it being invalid and contrary to the 1942 Rules.

This challenge to the validity of the Rules, 1990 now, at this stage, cannot be permitted to be raised for several reasons. The first is that the respondent writ petitioners even though described the 23rd July, 1990, Rules to be unconstitutional in Paragraph 8 of the writ petition yet no relief for quashing of the same was prayed for in the writ petition. It was only the consequential seniority the quashing whereof had been prayed. Sri Jain, learned counsel for the petitioners contends that a challenge having been pleaded, the Court can always mould the relief in exercise of powers under Article 226 of the Constitution, which powers continue with this Court in the present appeal, and it is for this reason that an application for amending the relief further praying for quashing of the same was moved in 2008.

We are unable to accept this plea primarily for the reason that such an amendment is highly belated and that too even after the writ petition was allowed in favour of the respondent-petitioners. The writ petitioners did not file any appeal praying for any further relief and they appear to have been satisfied with the quashing of the seniority list. Thus there was no intention to challenge the regularization rules dated 23rd July, 1990. The statement of fact made in Paragraph 8 of the writ petition by itself would not render a positive challenge raised without anything further. The respondent writ petitioners after the writ petition was allowed did not pursue this challenge at all and after four years of the pendency of the appeal, as a respondent, have moved an amendment application which otherwise cannot be entertained. Thus for laches and for the aforesaid reasons, this relief as prayed for to be moulded in their favour now cannot be considered on behalf of the respondent writ petitioners. The regularised LDA's have been conferred a benefit of regular appointment under the 1990 Rules and the same has become final it cannot be permitted to be reopened.

There is yet another reason for the same. As noted above, the validity of the said rules was also raised by those who were contesting the seniority of UDA in Writ Petition No. 6200 of 1993 decided on 23rd July, 1990. Secondly, the process adopted for selection and regular appointment under the said rules was also agitated therein. The Division Bench in the aforesaid judgment has answered the plea so raised by repelling the contentions and also upholding entire selection process under the regularization rules of 1990 in the following terms:-

"As far as the contention of the Direct Recruits regarding validity of Regularization Rules, 1990 is concerned, it is misconceived, inasmcuh as, Regularization Rules, 1990 derives its authority and force from Article 309 of the Constitution of India, hence it cannot be said that the rules are not statutory. The State Government in exercise of power under Article 309 of the Constitution, has been vested with a power to frame the rules and there exists no requirement to consult the Commission in that regard.

As far as next submission regarding the regularization of the services of the promotees on the same date when the rules came into force is concerned, as well as that the record being not placed before the Selection Committee etc. on behalf of the State Government, it was vehemently argued by Mr. Yogeshwar Prasad that the point raised before the Court pertains to determination of the question of fact which cannot be agitated upon because there is a presumption in favour of the State action

with regard to its correctness and fairness. Question of regularization was pending before the State Government much earlier to 1990. The State Government in that regard framed rules of Regularization in the year 1989, itself. Although the record of petitioners (promotees) services etc. were prepared in advance even before the Regularization Rules, 1989, but the services were regularized due to certain defect pointed out in that rule. Thereafter, Regularization Rules, 1990 were issued on 23.7.1990. The charts which were prepared in advance on the basis of the service record, were produced before the selection committee and after due application of mind the selection committee regularised the services of the promotees.

We are of the view that this Court in exercise of its jurisdiction under Article 226 of the Constitution of India, cannot adjudicate upon such contentious disputes. Hence, for that reason the regularization of the promotees cannot be annulled. During the course of arguments, a vain effort has been made to challenge the Regularization Rules, 1990, but no serious effort was made to assail the Rules, itself. As pointed out earlier the State Govt. in exercise of its power vested under Article 309 of the Constitution of India, issued the Regularization Rules, 1990 which is more or less similar to Regularization Rules, which were subject matter of dispute before Hon'ble Supreme Court in P.D. Agrawal (supra), which was upheld by Hon'ble Supreme Court. The said rule cannot be challenged on the ground of its being violative of Article 14 and 16 of the Constitution of India. Hence, we hold that the Regularization Rules, 1990 is valid and regularization made under the Rules does not suffer from any legal or constitutional defect."

The said judgment in its entirety, subject to a slight modification for fitment, has been upheld by the Apex Court and accordingly so far as the validity of rules and the selections by way of regularization has already become final. We therefore sitting in a coordinate bench cannot now reagitate or reopen the said issue when the said judgment has been upheld by the Apex Court through a speaking order. The amendment sought by the respondent writ petitioners in the present writ petition stands rejected and ***it is held that the selections and regular appointments under the Government Order dated 23rd July, 1990 has attained finality.***

Apart from this, the State has threadbare laid its policy and has assailed the decision of the learned Single Judge on the ground that the learned Single Judge has wrongly treated the regularised LDAs as promotees.

In the absence of any rule of promotion by way of officiation the holding of a post on officiating basis cannot be termed as promotion. Thus, this rule by itself does not confer a promotional status to an LDA if he is regularised under Rules of 1990. To the contrary, the rules make it clear that they shall be considered for regular appointment and not for being promoted on the post in question.

This being the position of the Rules, 1990, either way, namely under the Rules, 1942 or under the Rules, 1990, there is no rule for promotion to the post of LDA. Thus, those who have been given regular appointment under the Government Order dated 23rd July, 1990 as an LDA, the same is only by way of appointment which is no promotion and consequently reverting back to the definition contained in Rule 2(f) which are the 1942 Rules applicable, ***the said recruitment through regularization is direct recruitment and not promotion.***

Once having held that the regularised Lower Division Assistants are

not promotees, the question that remains to be answered is as to what rules of seniority have to be applied and in what manner? A perusal of the determination of seniority dated 2.11.2000 and the rejection of the representation on 21.11.2000 indicate a reference to the 1942 Rules and to the U.P. Government Servant Seniority Rules, 1991. However, a mere reference to the Rules without applying the same in terms of the entry of an incumbent into the cadre does not appear to have been spelt out categorically. We have already held that a person would be entitled to get his seniority counted only from the date of entry into his cadre which in turn would be dependent upon the availability of the vacancy against which the incumbent has been appointed in accordance with the Rules.

The LDAs, who were regularised on 23.7.1990, were also extended the benefit of seniority by virtue of Rule 7 of the said Rules of 1990 quoted hereinunder :-

"7. A person appointed under these rules shall be entitled to seniority in accordance with the Service Rules and for this purpose selection under these rules shall be deemed to be selection under the Service Rules :

Provided that the inter-se seniority of the candidates so appointed shall be the same as it was in the cadre from which they were promoted on an officiating basis."

The said rule clearly indicates that seniority would be in accordance with the Service Rules as the selections are under the Service Rules. The word "Service Rule" has been defined under Rule 3(6) of the Regularisation Rules to mean the Uttar Pradesh Secretariat Ministerial Staff Rules, 1942. Rule 2 thereof specifically states that they shall have effect notwithstanding anything to the contrary contained in any other rules or orders. Thus, the seniority of those who were regularised under the said rules in 1990 has to be determined as per Rule 46 of the Rules, 1942 upon determination of vacancy as per the 1942 Rules read with the Seniority Rules, 1991. This determination of vacancy has however to be calculated in accordance with the definition of the word "Available Vacancy" contained in Rule 3(2) of the 1990 Regularisation Rules extracted hereinunder :-

"(2) "Available Vacancy" means a Vacancy for which no candidate has been recommended by the Commission before the date of notification of these rules."

The word "Available Vacancy" has been defined to mean a vacancy against which no candidate has been recommended by the Commission before the date of notification of the said rules on 23.7.1990.

The vacancy has to be one which has been determined under Rule 11 of the 1942 Rules. Rule 11 of the 1942 Rules is extracted hereinunder :-

"11. Number of vacancies to be filled - The appointing authority shall annually ascertain the number of vacancies available at the commencement of a year and also those expected to occur during that year in the posts of Upper Division Assistants, Translators, Lower Division Assistants and Stenographers and accordingly intimate to the Commission the number of vacancies intended to be filled on the results of the examination or selection, as the case may be, to be held that year, indicating also the number of posts reserved in each category under rule 6 for candidates belonging to Scheduled Castes."

In order to calculate the vacancy, therefore, one will have to go back to the availability of the vacancy prior to the enforcement of the said rule which vacancies have to be such so that a person can claim his substantive appointment

against such vacancy. The reason is that seniority would be given only from the date of substantive appointment against such a vacancy. This determination for all such candidates who have been regularised will therefore have to be made by preparing a separate chart indicating as to how and when the vacancy became available.

This is necessary as the vacancies came to be created vide Government Order dated 6.8.1990 apart from the vacancies which were existing. The first thing therefore to be done is as to which were the vacancies that were available on 23.7.1990. So far as their subsequent adjustment is concerned, the same can only be from the date any vacancy is made available. This peculiar situation has arisen because of the fact that the regularisation rules have been enforced even prior to the declaration of the vacancies on 6.8.1990 which do indicate the dates from which they have been made available to the incumbents. The question is that the available vacancy has to be against such a vacancy for which no candidate had been recommended by the Commission before the notification of the Rules. The criteria therefore again will have to be as to whether the vacancy was available so as to cover the regularised appointments envisaged under the notification dated 23.7.1990. It is only then that seniority can be claimed by the incumbent under Rule 46 of the 1942 Rules read with Rule 7 of the 1990 Regularisation Rules.

There is one more aspect which has to be adopted while determining seniority, namely, the determination of seniority on account of the U.P. Government Servant Seniority Rules, 1991 coming into force. This is necessary because the said Seniority Rules of 1991 came into effect from 23.03.1991 and the seniority lists were prepared initially on 24.07.1991 and 25.07.1991. Thus, the Seniority Rules had come into force by the time the seniority list had been issued. Consequently, the impact thereof has also to be taken into account as the provisions of reservation or of any other criteria mentioned in the said rules could not have been ignored. The candidates, who came to be appointed on substantive basis after 23.03.1991, their seniority would be governed by the Rules, 1991 as they have an overriding effect over all other rules of seniority. This aspect has also escaped notice of the learned Single Judge for modulating the seniority in terms thereof.

Accordingly, the State Government will now have to undertake an exercise in the light of the aforesaid principles and redetermine the seniority as they would have an impact on the consequential benefits to which the respondent-petitioners may be entitled or their adversaries would be entitled as a result of such determination.

Having regard to the reasons given by us hereinabove, the position that emerges is:-

1. That the respondent-petitioners did have a cause of action as their objections vis-a-vis the seniority of those LDAs', who were regularised vide order dated 23rd July, 1990 against posts created on 06.08.1990, adversely affected the respondent-petitioners with the promulgation of the seniority list on 02.11.2000 and the rejection of the representation on 21.11.2000. We further hold that the petition of the respondent-petitioners is not barred by laches for all the reasons recorded hereinabove nor have they delayed the filing of the writ petition as the cause of action arose to them only after the lists and orders were issued on 2.11.2000 and 21.11.2000 respectively.

2. The Division Bench judgment dated 2nd July, 1996 in the case of U.P.

Secretariat, UDA Association and 7 others Vs. State of U.P., Writ Petition No. 6200 of 1993 as affirmed by the Supreme Court in the decision in Special Appeal No. 25086 of 1996 decided on 27.1.1997 by the Apex Court and reported in 1999 (1) SCC 278; U.P. Secretariat UDA Association Vs. State of U.P. and others has attained finality as in relation to Upper Division Assistants, subject to the direction issued by the Hon'ble Apex Court to the effect that promotees are also required to be fitted into service from the date when they are entitled fitment in accordance with the quota and rota prescribed under the rules, but at the same time the said judgment would not be an impediment for the reasons given in our judgment hereinabove for determining the limited issue of seniority of the Lower Division Assistants.

3. The status of the employees who have been regularized under the Rules, 1990 and have been appointed under the post creation order dated 6th August, 1990 are not promotees and can only be treated as direct recruits for the reasons given in the judgment hereinabove. The presumption raised and the finding recorded by the learned Single Judge to that extent stands reversed.

4. In view of our findings and conclusions that the candidates, who fall under the Rules, 1990 are not promotees and are direct recruits, there is no reason to apply the quota and rota rule for promotees for them.

5. For the reasons given by us hereinabove, we also hold that the State Government has not been able to establish about any exercise of having undertaken for determining the vacancies under Rule 11 of the Rules, 1942 as per the cadre strength defined under the rules. This exercise will also have to be undertaken to first determine the vacancies that are available in Rule 3(2) of the Rules, 1990 in order to determine as to whether the appointments by way of regularization have been offered against the substantive vacancies available with regard to which no candidate had been recommended by the Commission before the notification of the said rules on 23rd July, 1990. The argument of the learned counsel for the respondent-petitioners that in order to claim seniority those who have been regularized, their induction into the cadre and date of entry upon being appointed in a substantive capacity against a substantive vacancy has to be determined before extending to them the benefit of seniority, is accepted.

6. For this the status of post creation or availability of the post in the cadre, the vacancies determined as per rules and then the placement according to the date of substantive appointment will have to be determined.

7. So far as those who have been extended the benefit of 15% promotion from the post of Group-D/Class IV Employees, their status stands determined by the introduction of sub-rule (4) of Rule 14 of the 1942 Rules as introduced on 5.11.1990 and therefore they have to be allocated their space as per their appointment under the aforesaid provision.

In view of the conclusions drawn hereinabove and the reasons in support thereof, we allow Special Appeal No. 31 of 2005 and set aside the judgment dated 6th August, 2004 but at the same time we also grant relief to the writ petitioners to the extent of allowing the writ petition and quashing the final seniority list dated 2nd November, 2000 as well as the rejection of the representation of the writ petitioners vide order dated 21st November, 2000. All consequential action taken pursuant to the judgment dated 6.8.2004 would also stand

annulled including the seniority list dated 21.10.2005.

As a consequence of the aforesaid relief having been extended, we further clarify that the seniority list of the LDA shall be redetermined in the light of the observations made hereinabove and the principles that have been spelled out in this judgment as well as the rules and regulations applicable as per the law prescribed and after the exercise is completed, the list of 24.07.1991 and 25.07.1991 would stand modified accordingly if necessary as a fall out of such exercise. This exercise shall be undertaken by the State Government and concluded preferably within a period of three months and till such exercise is concluded no fresh third party rights should be created till finalization of the seniority as per this judgment. So far as the consequential action taken by the State Government pursuant to the impugned judgment dated 6th August, 2004 is concerned, since the judgment has been set aside, any action taken on the strength thereof also falls through.

36. In view of above, the controversy in relation to the appointment of the persons on the post of LDA under the provisions of Rules, 1990 has already been decided by the coordinate Bench of this court vide order dated 08.05.2015, which has also been upheld by the Hon'ble Apex Court.

37. Thus, it is crystal clear that the issue of appointment/regularisation of 2004 persons on the post of LDA vide Government order dated 23.07.1990 has already been decided by the coordinate Bench and declared all the aforesaid appointee as direct recruitee. The coordinate Bench also found that on 23.07.1990, since 1231 substantive vacancies of LDA were available and 773 temporary posts of LDA were created vide Government Order dated 06.08.1990 with the consent of Finance Department dated 03.08.1990, therefore, said 773 LDAs are entitled to seniority from 06.08.1990 and not from 23.07.1990.

As the respondent-petitioners are appointed against the U.P. Secretariat Upper/Lower Division Clerks Examinations 1991 & 1995, in pursuance of requisition of State Government dated 19.03.1991 and 13.04.1994, therefore, they are entitled for their seniority from the date of their appointment as per Seniority Rules, 1991.

It is well settled by the Hon'ble Apex Court in the case of **K. Meghachandra Singh & Ors. Vs. Ningam Siro & Ors., 2020 (5) SCC 689** that the seniority will be given from the date when the employee born in the cadre, therefore, the persons appointed in pursuance of the requisitions dated 19.03.1991 and 13.04.1994, cannot be placed above the persons appointed in the year 1990. The relevant part of the judgment is reproduced as under :

"30. We may also benefit by referring to the judgment in State of U.P. v. Ashok Kumar Srivastava [State of U.P. v. Ashok Kumar Srivastava, (2014) 14 SCC 720 : (2015) 3 SCC (L&S) 536] . This judgment is significant since this is rendered after the N.R. Parmar [Union of Indiav. N.R. Parmar, (2012) 13 SCC 340 : (2013) 3 SCC (L&S) 711] decision. Here the Court approved the ratio in Pawan Pratap Singh v. Reevan Singh [Pawan Pratap Singh v. Reevan Singh, (2011) 3 SCC 267 : (2011) 1 SCC (L&S) 481] , and concurred with the view that seniority should not be reckoned retrospectively unless it is so expressly provided by the relevant Service Rules. The Supreme Court

held that seniority cannot be given to an employee who is yet to be borne in the cadre and by doing so it may adversely affect the employees who have been appointed validly in the meantime. *The law so declared in Ashok Kumar Srivastava [State of U.P. v. Ashok Kumar Srivastava, (2014) 14 SCC 720 : (2015) 3 SCC (L&S) 536] being the one appealing to us, is profitably extracted as follows : (SCC p. 730, para 24)*

"24. The learned Senior Counsel for the appellants has drawn inspiration from the recent authority in Pawan Pratap Singh v. Reevan Singh [Pawan Pratap Singh v. Reevan Singh, (2011) 3 SCC 267 : (2011) 1 SCC (L&S) 481] where the Court after referring to earlier authorities in the field has culled out certain principles out of which the following being the relevant are produced below : (SCC pp. 281-82, para 45)

"45. (ii) Inter se seniority in a particular service has to be determined as per the service rules. The date of entry in a particular service or the date of substantive appointment is the safest criterion for fixing seniority inter se between one officer or the other or between one group of officers and the other recruited from different sources. Any departure therefrom in the statutory rules, executive instructions or otherwise must be consistent with the requirements of Articles 14 and 16 of the Constitution.

***

(iv) The seniority cannot be reckoned from the date of occurrence of the vacancy and cannot be given retrospectively unless it is so expressly provided by the relevant service rules. It is so because seniority cannot be given on retrospective basis when an employee has not even been borne in the cadre and by doing so it may adversely affect the employees who have been appointed validly in the meantime.' "

Admittedly, the aforesaid facts were not considered at the time of issuing of seniority list of LDA dated 08.09.2015.

38. As it is evident that on 23.07.1990, only 1231 posts of LDAs were available, but 2004 persons officiating as LDA were appointed under the Rules, 1990, i.e., 773 persons were appointed beyond the sanctioned strength, therefore, 773 temporary posts of LDA were created on 06.08.1990, thus, we hereby hold that the said 773 persons are entitled for seniority from 06.08.1990. We further hold that persons appointed against the Examinations 1991 & 1995 are entitled to get their seniority as per Rules, 1942 read with Seniority Rules, 1991.

39. In view of facts and discussions made above, impugned order dated 21.09.2017 passed in Writ Petition (S/S) No. 5828 of 2015 (Dr. Kishore Tandon & Ors. Vs. State of U.P. & Ors.) along with connected Writ Petition (S/S) No. 12598 of 2017 (Hari Shankar Nath Tiwari & Ors. Vs. State of U.P. & Ors.) is hereby set aside with all consequentials. Seniority list dated 08.09.2015 in relation to 773 LDAs who were adjusted against the post creation order dated 06.08.1990 and the LDAs appointed in pursuance of Requisition dated 19.03.1991 onwards, is also hereby quashed.

The special appeals stand allowed.

40. State Government is directed to prepare the seniority list of Assistant Review Officer (earlier known as LDA) in the light of the observations made hereinabove and as per the prescribed law, within four months from today.

41. 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.

42. 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)06ILR A659
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.06.2021

BEFORE

THE HON'BLE MRS. SUNITA AGARWAL, J.
THE HON'BLE DEEPAK VERMA, J.

Writ -A No. 4855 of 2020

Search Operator Association & Ors.
...Petitioners
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Hanuman Prasad Dube, Sri Vipul Dube

Counsel for the Respondents:
C.S.C.

A. Civil Law – U.P. Motor Vehicles Rules, 1998 - Rule 181- U.P. Motor Vehicles Act, 1988: Sections 113, 114, 19 & 200 - Motor Vehicles – Regulation of overload vehicles -

In the present case, the controversy revolves around the mechanism provided in the U.P. Motor Vehicle Rules, 1998 which have been framed under Motor Vehicles Act, 1988. (Para 12)

Permitting the overloaded vehicles to ply on the public road after composition of the offence punishable u/s 194 would amount to fresh commission of offence in terms of S. 113(3) of the Act. The State thus cannot permit carriage of the excess weight to ply on the public road after compounding. (Para 13)

A mechanism was evolved vide circular dated 30.10.2015, to curb the menace of overloaded vehicles plying on the public roads which has resulted in significant damage to the road surface, causes pollution through auto-emissions and is safety hazard not only for the vehicles but also for other road users. (Para 14, 15)

It was resolved in the meeting held on 28.10.2015 under the Chairmanship of the Minister of Public Works Department that effective steps have to be taken for regulating the problem of overloading in the State of U.P. The direction was then issued by the Transport Commissioner, U.P., Lucknow in view of the said resolution by means of the circular dated 30.10.2015 to all Regional Transport Authorities (Enforcement) authorising them to get the data from the toll plazas regarding overweight vehicles. For compliance of the above directions, communications were issued from time to time and the procedure of issuance of e-challan on the basis of the data collected from the toll plazas had been set in operation since the year 2015. (Para 15)

As there is no challenge to the circular dated 30.10.2015 (which has been filed alongwith the counter-affidavit), **the plea of the petitioners that retrospective effect has been given to the office order dated 22.5.2020 by the U.P. Transport Commissioner is liable to be rejected.**

B. Motor Vehicles Act, 1988 - Sections 67 & 68 – The challenge to the jurisdiction of the Regional Transport Authorities to issue e-challan on the basis of the data of overload vehicles passed through weigh-in-motion machines installed at the toll plazas of National Highways Authority of India is found baseless. The Transport Commissioner, U.P., Lucknow being the State Transport Authority is empowered to give effect to the directions issued by the State

Government u/s 67 of the Act and to exercise and discharge such powers and functions which are necessary to coordinate and regulate the activities and policies of the Regional Transport Authorities. (Para 17)

U.P. Motor Vehicle Rules, 1998 - Rule 181 - It has been brought on record that the weigh-in-motion machines installed at the toll plazas established under the National Highways Act are certified by the Controller, Weights and Measures Department which is the competent authority to issue a license in such matters. The stand of the respondent No. 2 (the Transport Commissioner, U.P., Lucknow) that the weighing machines installed in the toll plazas are covered by Rule 181 is found justifiable, as it cannot be said that they are not certified weighing devices within the meaning of Rule 181 of the Rules. (Para 16, 18)

C. The challenge to the accuracy of the weight measured by the weigh-in-motion machines installed at the toll plazas indicated in the e-challans issued by the Regional Transport Authorities, cannot be sustained. (Para 19)

The records indicate that the statement of "allowed weight", "vehicle weight" and "overweight" had been given to the driver of the vehicle with the relevant details indicating the date and time of journey at the toll plaza itself. It, therefore, cannot be said that the driver or the person incharge of the vehicle had not been given statement in writing of the weight of the vehicle as is required under sub-rule (5) of Rule 181. (Para 18)

Moreover, there is no challenge to the accuracy of the weighing devices in accordance with the provisions of sub-rule (6) of Rule 181 which gives right to the driver of a vehicle to make a statement in writing to challenge the accuracy of the weighing device; (i) Within one hour of the receipt of the statement referred to in sub-rule (5) of the rule vehicle being overweight, or (ii) Within fifteen days of the service of notice of the proceeding (of challan) against him u/s 86 or S. 113. (Para 19)

D. Motor Vehicles Act, 1988 - Section 194 – It is to be noted that it is the bounden duty of the officers of the Motor Vehicles Department authorized by the State Government to ensure the compliance of the mandatory provisions of the Act. S. 114 read with S. 194 of the Act clearly provides that if on weighing the vehicle is found to contravene in any respect the provisions of S. 113 regarding weight, by an order in writing, the officer of the Motor Vehicles Department shall direct the driver to off-load the excess weight at his own risk and will not allow him to remove the vehicle from that place until the laden weight has been reduced. Charges of off-loading of excess weight have to be paid by the driver or the person incharge of the vehicle. **The inaction of the Regional Transport Authorities to ensure compliance of S. 114(1) of the Act read with S. 194(1) is, thus, writ large on the face of the record.** (Para 21)

The penalty or compounding fee for the offence committed u/s 194 of the Act had been imposed by the e-challan while initiating proceedings under the Motor Vehicles Act. It is, thus, clear that the offence for which the compounding fee was imposed was allowed to continue beyond the toll plaza. No notification of the State Government to address the said issue has been brought before the Court. (Para 20)

The State Government is, therefore, directed to issue necessary notification to remove this discrepancy so as to comply with the directions of the Apex Court in *Paramjit Bhasin* (infra) in conformity with the Motor Vehicles Act and the rules framed thereunder. (Para 22)

Writ petition dismissed. (E-3)

Precedent followed:

1. Paramjit Bhasin & ors. Vs U.O.I. & ors., 2005 (12) SCC 642 (Sub Para 1 of Para 11)

2. P. Ratnakar Rao Vs. Govt.of A.P., 1996 (5) SCC 359 (Para Sub Para 3 of Para 12)

Present petition assails Office Order dated 22.05.2020, issued by Transport Commissioner, U.P., Lucknow.

(Delivered by Hon'ble Mrs. Sunita Agarwal, J. & Hon'ble Deepak Verma, J.)

1. Heard Sri Hanuman Prasad Dube assisted by Sri Vipul Dube learned counsels for the petitioners and Sri B.P. Singh Kachhawaha learned Standing Counsel for the State respondents.

2. The petitioners (14 in number) claim to be the owners of Public Service Vehicles (Trucks) and submit that they have been operating their vehicles for carrying goods from one destination to another for a long time.

3. The challenge in the writ petition is to the Office Order No. 677 dated 22.5.2020 issued by the Transport Commissioner, U.P., Lucknow namely respondent no. 2. Further prayer in the writ petition is to quash all consequential actions/orders passed by respondent nos. 3 to 10, who are the Regional Transport Authorities at the district level, in compliance of the impugned Office order dated 22.5.2020. A writ of mandamus has also been sought restraining the authorities from issuing e-challan of the vehicles owned by the petitioners in the light of the impugned office order.

4. The submission of the learned counsel for the petitioners is that the e-challans had been issued by respondent nos. 3 to 10 in the month of June, 2020 on the premise that the overloaded vehicles were plied on the public roads by the petitioners on different dates in the month of January, 2020. The basis of the said allegation is the data of weight/overweight provided by the toll plazas which had been established under the National Highways Authority Act, 1956.

The submission is that the statutory provisions regulating operations of the public vehicles namely U.P. Motor Vehicle Rules, 1998 have been framed in exercise of powers under the Motor Vehicles Act, 1988 (hereinafter referred to as "the Act" and "the Rules"). It is contended that the statutory enactments namely the Act and the Rules grant power on the Authority and prescribe procedure in the matter of regulation of overload vehicles on public roads which has to be strictly adhered to.

5. Relevant Sections 113 and 114 of the Act, 1988 and the Rule 181 of the Rules, 1998 have been placed before the Court to submit that under the Act, the owner of the public service vehicle has to maintain the gross vehicle weight as specified in the registration certificate. In the event, the gross weight of the public service vehicle exceeds the weight specified in the certificate of registration of the vehicle, the officer of the Motor Vehicle Department is empowered to act in accordance with Section 114 of the Act, i.e. to place the vehicle for weighment on an the approved weighing scale and in case the overloading is found, the driver, the person incharge of the vehicle or the owner has to off-load the excess weight at his own risk and only then he will be allowed to further operate the vehicle. The aforesaid officer is also empowered to impose penalty in respect of excess weight found in the vehicle,for violation of the Rules.

It is contended that Rule 181 of the Rules provides procedure for weighment of the public service vehicle and also entitles the owner of the vehicle to dispute the accuracy of weighing device and thus the accuracy of weight of the vehicle determined by such device. What would be the weighing device, has been prescribed in sub-rule (1) of the Rule 181 and it does not include the weighing machines installed in

toll plazas established under the National Highways Authority Act. The Transport Commissioner, U.P., Lucknow is working as the State Head of the Transport Department but he has no legislative power to substitute the rules, inasmuch as, any amendment in the rules can only be made in accordance with the provisions of the Motor Vehicles Act by the State Government. No such amendment has been made and as such it is not permitted for the Transport Commissioner, U.P., Lucknow (respondent no. 2) to deviate from the procedure prescribed in the rules.

6. It is vehemently argued that if a particular procedure has been prescribed under the law to do a thing in a particular manner, they shall be done in that very manner or not at all. The office order dated 22.5.2020 issued by the Transport Commissioner is, thus, in contravention of the statutory rules and cannot be allowed to be sustained as it amounts to overreach the provisions of the Act and the Rules.

It is further contended that an Enforcement Department has been created under the Transport Department in the State of U.P. and the officers of the enforcement squad constituted at the district level has been assigned task of regulating the vehicles on the public roads. Under the scheme of the Act and the Rules framed thereunder, they are empowered to check and challan the vehicles and even seize the vehicle, in case of contravention of the mandatory provisions of the statute. The action of respondents/district authorities in issuing e-challens on the basis of the data provided by the toll plaza is nothing but usurption of the power of the Enforcement squad to check, challan and seize the vehicle whenever such an action is required. The e-challan issued by the Regional Transport Authorities imposing penalty for the alleged offence of plying overload vehicle was, thus, without jurisdiction.

Even otherwise, the Transport Commissioner issued orders in the month of May, 2020 and e-challans had been issued under the Motor Vehicles Act for alleged offence committed in the month of January, 2020. No retrospective effect can be given to the procedure prescribed by the Transport Commissioner, even if, the same is found in accordance with law.

Even otherwise, the weighing machines installed at the toll plazas cannot be said to be a weighing device within the meaning of Rule181 framed under the Act. The reading of the said device cannot be used to penalize the petitioners. Consequentially all e-challans issued by the Regional Transport Authorities against the petitioners are liable to be quashed and further direction is to be issued to restrain the respondents from taking such an action in future.

7. The record indicates that a counter affidavit has been filed on behalf of respondent nos. 2, 3 and 5 under the directions issued by this Court in the order dated 4.11.2020 in the present petition. This Court had required the learned Standing Counsel to file counter affidavit either of the Transport Commissioner, U.P., Lucknow or any responsible officer nominated by him to indicate as to whether the order dated 22nd May, 2020 (Annexure '3' to the writ petition) circulated to the Regional Transport Officers, Mirzapur/Saharanpur takes into account the weighing procedure prescribed by the statutory provisions and the Rules and whether the toll plazas that are required to

obtain and furnish the data had been accredited accordingly. It was also to be indicated as to whether such accredition was provided and obtained by the toll plazas for which data was sought by the impugned order dated 22nd May, 2020.

The answer to the said queries and para-wise reply to the writ petition in the counter affidavit of respondent nos. 2, 3 and 5 have been placed before the Court by the learned Standing Counsel.

It is submitted that the weighing machines installed in the toll plazas are accredited by the Metrology Department and the Controller, Weights & Measures which are the competent Authorities to qualify, verify and validate the test data. It is contended that the Controller, Weights & Measures is the competent authority to grant licence to manufacturers/dealers in weights and measures after the accredition was provided. After installation of the weighing machines, their performance audit is being conducted every three months by the competent authority.

8. Learned standing counsel submits that with the increasing problems of overloading of vehicles and the resultant road accidents, in order to effectively control the situation, a directive dated 30.10.2015 was issued by the Transport Commissioner, U.P., Lucknow. A copy of the said order has been appended as Annexure C.A. '3' to the counter affidavit.

It was provided therein that the concerned Assistant Regional Transport Officer (Enforcement) will get the list of overloaded vehicles passed through weigh-in-motion machines installed in the toll plazas of the National Highways Authority of India (NHAI) on daily basis through e-mail and necessary action shall be taken for issuance of challan as per the provisions of the Motor Vehicles Act, 1988 and the Rules, in case of offending overloaded vehicles. It was also provided that as evidence, C.C.T.V. footage from the toll plaza shall be collected on weekly basis. This direction was to be implemented immediately.

9. We may note that there is no challenge to the aforesaid communication by the petitioners though the same has been brought on record along with the counter affidavit.

A further direction was issued on 20th January, 2016 by the Transport Commissioner, U.P., to the Project Director, National Highways Authority of India and the Regional Officers with reference to the letter dated 30th October, 2015. It was requested therein that the list of overload vehicles passed through the toll plaza wherein weigh-in-motion machines have been installed shall be provided to the Regional Transport Officer on regular basis so that effective action under the Motor Vehicles Act can be taken against the offenders.

The impugned office order dated 22.5.2020 was issued in the light of the above noted previous orders asking the Regional Transport Officers to provide information in the prescribed proforma on the basis of the daily data provided in the excel sheets of the toll plaza in the area of their jurisdiction with regard to the overload vehicles for the period from 1.1.2020 till 15.3.2020.

10. We may further note here that a national lock-down was declared from 26.3.2020 till the end of April, 2020 in

view of the progression of Covid-19 infection.

Further a letter dated 12.6.2020 was issued from the office of the Transport Commissioner, U.P. addressed to the Chief Executive Officer, U.P. Expressway Industrial Development Authority (UPEIDA), Yamuna Expressway Industrial Development Authority (YEIDA), U.P State Highways Authority (UPSHA) and the Regional Officers, East and West, National Highways Authority of India apprising them that arrangement has to be made to integrate e-challan with the overloading data received from the weighing devices installed at the toll plazas. It was directed that in view of the decision taken in the meeting held on 19.5.2020 under the Chairmanship of the Chief Minister, Uttar Pradesh, action had to be taken for integrating the above data and to provide list of overload vehicles at the official e-mail of the Regional Transport Officers (Enforcement) so that effective steps may be taken for compliance of the order of the National Green Tribunal, New Delhi.

11. Alongwith the counter affidavit, a judgment and order dated 9th November, 2005 passed by the Apex Court in Paramjit Bhasin and others vs. Union of India and others1 has been appended. It was brought to the notice of the Court that the Apex Court had issued a slew of directions therein to the State Governments to take effective steps to regulate the plying of overload vehicles in their State.

The rejoinder and the supplementary rejoinder affidavits have been filed by the petitioners to contradict the averments made in the counter affidavit. The averments in the writ petition are reiterated therein to assert that the right of the petitioner to raise objections with regard to the accuracy of the weighing machines provided in the Rules cannot be taken away by the circulars issued by the Transport Commissioner allegedly on the basis of some directions issued by the Chief Minister of the State in a supervisory meeting. No notification of the State has been brought on record either to supplement the rules nor any amendment in the rules has been made or even proposed.

A copy of the statement of a toll plaza named as Daffi Toll Plaza, (Annexure S.R.A.-1 to the supplementary rejoinder affidavit) has been placed to assert that even information being supplied by the toll plazas are incomplete and incorrect and, therefore, no further action can be taken on the basis of such incomplete and incorrect data.

12. Having heard learned counsel for the parties and perused the record, it is evident that the controversy revolves around the mechanism provided in the U.P. Motor Vehicle Rules, 1998 which have been framed under the Motor Vehicles Act, 1988. Relevant Sections 113, 114, 194, 200 of the Act, 1988 and Rule 181 of the Rules, 1998 relied by the learned counsel for the petitioners are extracted hereunder:

"113. Limits of weight and limitations on use.-*(1) The State Government may prescribe the conditions for the issue of permits for [transport vehicles] by the State or Regional Transport Authorities and may prohibit or restrict the use of such vehicles in any area or route.*

(2) Except as may be otherwise prescribed, no person shall drive or cause or allow to be driven in any public place

any motor vehicle which is not fitted with pneumatic tyres.

(3) No person shall drive or cause or allow to be driven in any public place any motor vehicle or trailer-

(a) the unladen weight of which exceeds the unladen weight specified in the certificate of registration of the vehicle, or

(b) the laden weight of which exceeds the gross vehicle weight specified in the certificate of registration.

(4) Where the driver of person in charge of a motor vehicle or trailer driven in contravention of sub-section (2) or clause (a) of sub-section (3) is not the owner, a court may presume that the offence was committed with the knowledge of or under the orders of the owner of the motor vehicle or trailer.

114. Power to have vehicle weighed : (1) *Any officer of the Motor Vehicles Department authorized in this behalf by the State Government shall, if he has reasons to believe that a goods vehicle or trailer is being used in contravention of Section 113 require the driver to convey the vehicle to a weighing device, if any, within a distance of ten kilometers from any point on the forward route or within a distance of twenty kilometers from the destination of the vehicle for weighment; and if on such weighment the vehicle is found to contravene in any respect the provisions of Section 113 regarding weight, he may, by order in writing, direct the driver to off-load the excess weight at his own risk and not to remove the vehicle over trailer from that place until the laden weight has been reduced or the vehicle or trailer otherwise been dealt with so that it complies with Section 113 and on receipt of such notice, the driver shall comply with such directions.*

(2) Where the person authorized under sub- section (1) makes the said order in writing, he shall also endorse the relevant details of the overloading on the goods carriage permit and also intimate the fact of such endorsement to the authority which issued that permit.

194. Driving vehicle exceeding permissible weight*: (1) Whoever drivers a motor vehicle or causes or allows a motor vehicle to be driven in contravention of the provisions of Section 113 or Section 114 or Section 115 shall be punishable with minimum fine of two thousand rupees and an additional amount of one thousand rupees per tonne of excess load, together with the liability to pay charges for off-loading of the excess load.*

(2) Any driver of vehicle who refuses to stop and submit his vehicle to weighing after being directed to do so by an officer authorized in this behalf under Section 114 or removes or cause to removal of the load or part of it prior to weighing shall be punishable with fine which may extend to three thousand rupees.

200. Composition of certain offences*: (1) Any offence whether committed before or after the commencement of this Act punishable under Section 177, Section 178, Section 179, Section 180, Section 181, Section 182, sub- section (1) or sub-section (2) of Section 183, Section 184, Section 186, Section 189, sub-section (2) of Section 190, Section 191, Section 191, Section 194, Section 196, or Section 198, may either before or after the institution of the prosecution, be compounded by such officers or authorities and for such amount as the State Government may, by notification in official gazette, specify in this behalf.*

(2) Where an offence has been compounded under sub-section (1) the offender, if in custody, shall be discharged and no further proceedings shall be taken against him in respect of such offence.

***Rule 181 of the Rules**:- Weighing Device: Installation and use of- (1) A weighing device for the purpose of Section 144 may be-*

(i) weigh-bridge installed and maintained at any place by or under the orders of the State Government or a local authority; or

(ii) weigh-bridge installed and maintained by any person and certified by the registering authority, to be a weighing device for the purpose of the Act and these rules; or

(iii) a portable wheel-weigher of any kind approved by the State Government.

(2) The driver of any goods carriage shall, upon demand by any officer of the Transport Department mentioned in sub-rule (1) of Rule 227 or a registering authority, so drive and manipulate the vehicle as to place it or any wheel or wheels thereof, as the case may be, upon any weigh-bridge or whee-weighers in such a manner that the weight of the vehicle or the weight transmitted by any wheel or wheels may be exhibited by the weigh-bridge or wheel weigher.

(3) If the driver of a motor vehicle fails within a reasonable time to comply with requisition under sub-rule (2) a person authorised under Section 114 may cause any person, being the holder of driving licence authorising him to drive such vehicles to drive and manipulate the vehicle.

(4) When the weight of axle-weight of a motor vehicle is determined by separate and independent determined of the weight transmitted by any wheel or wheels of the vehicle the axle-weight and the laden weight of the vehicle shall be deemd to be the sum of the weights transmitted by the wheels of any axle or by all the wheels of the vehicle, as the case may be.

(5) Upon weighment of a vehicle in accordance with the Section 114 and this rule, the person who has required the weighment or the person in charge of the weighing device shall deliver to the driver or other person incharge of the vehicle a statement in writing of the weight of the vehicle and of any axle, the weight of which is separately determined.

(6) The driver or the person in charge of, or owner of a vehicle which has been so weighed may challenge the accuracy of the weighing device, by a statement in writing delivered-

(i) within one hour of the receipt of the statement referred to in sub-rule (5) to the person by whom the statement was delivered to him and followed by a deposit of rupees twenty in the office of the Regional Transport Officer or Assistant Regional Transport Officer, as the case may, within three days of the date of weighment, failing which the statement challenging the accuracy of the machine shall not be maintainable; or

(ii) within fourteen days of the service on him of notice of proceedings against him under Section 86 or Section 113 to the authority or court issuing such notice.

(7) Upon receipt of statement challenging the accuracy of a weighing device under sub-rule (6), the person or authority or the court, by when the statement is received after ensuring that the deposit of rupees twenty has been made, shall apply to the District Magistrate for the weighing device to be tested by such person as the District Magistrate may appointment and the certificate of such person, as may be so appointed, regarding the accuracy of the weighing device shall be final.

(8) If, upon the testing of a weighing device as aforesaid the weighing device is certified to be inaccurate to an extent

greater than any weight by which the gross vehicle weight or unladen weight or any axle weight of the vehicle is shown in the statement referred to in sub-rule (5) to have exceeded the gross vehicle-weight or the registered unladen weight or the registered axle weight, as the case may be, no further proceedings shall be taken in respect of any gross vehicle weight or unladen weight or axle weight and if the device is certified to be inaccurate to the said extent in respect of every such gross vehicle weight unladen weight, axle weight actually weighed, the deposit prescribed in sub-rule (6) shall be refunded.

(9) No person shall, by reason of having challenged the accuracy of any weighing device under sub-rule (6), be entitled to refuse to comely with any order in weighing under Section 113."

A reading of Section 113 of the Act shows that it is within the jurisdiction of the State Government to regulate plying of the transport vehicles in any area or route within their jurisdiction. Sub-section (3) of Section 113 clearly prohibits plying of any motor vehicle or trailer in any public place which is overweight as per the conditions mentioned in clause (a) (b) of the said sub-section.

Section 114 empowers an officer of the Motor Vehicles Department authorized by the State Government to intercept a goods vehicle or trailer, with respect to which he has reason to believe that it is being used in contravention of Section 113. It can require the driver to convey the vehicle to the weighing devices and on such weighment, if the vehicle is found to contravene the provisions of Section 113 regarding weight, he may direct the driver to off-load the excess weight at his own risk and not to remove the vehicle or trailer from that place and will not allow it to ply unless the laden weight has been reduced so as to comply with Section 113. The officers so authorized while making the said order in writing shall endorse the relevant details of the overloading on the goods carriage permit and intimate the said fact to the concerned authority. Section 194 provides penalty for contravention of the provisions of Sections 113 or 114 of the Act. Any driver of such vehicle if refuses to stop on interception by the officer concerned, he shall be punishable with additional penalty upto Rs. 3000/-. The offence committed under Section 194 (1) and (2) are compoundable under Section 200 of the Act.

While interpreting the provisions of Section 194(1) and Section 200 of the Act, penalty and compounding of the offence, in the case of **Paramjit Bhasin**1 , the Apex Court has noted that the constitutional validity of the provision has been upheld in **P. Ratnakar Rao vs. Government of A.P.**2. However, on the question of challenge therein to the notifications which have been issued by the State Government under the provisions of Section 200 of the Motor Vehicles Act, it was held that the said provisions does not authorize the State Government to permit the excess weight to be carried on the road when on inspection it was noticed that the load of carriage was beyond the permissible limit. It was held that the intention of unloading the excess weight is apparent from a bare reading of Section 194(1), inasmuch as, the liability to pay charge for off-loading excess weight is fixed on the person who drives the vehicle or causes a motor vehicle to be driven in contravention of the provisions of Sections 113 and 114.

13. It was noted by the Apex Court that certain States were issuing green cards/golden passes purportedly on the

basis of the power of composition under Section 202. After examining the matter, the Central Government had requested the respective States to discontinue such cards/passes. The counsels appearing for the State therein submitted that though the system of issuing cards/passes had been discontinued but the off-loading excess weight from large number of vehicles created traffic problems and several other practical problems which according to them needed to be addressed.

In the light of the aforesaid, the Apex Court had issued the following directions:-

"It is indisputable that the power of compounding vests with the State Government, but the notification issued in that regard cannot authorize continuation of the offence which is permitted to be compounded by payments of the amounts fixed. If permitted to be continued, it would amount to fresh commission of the offence for which the compounding was done. The State Governments which have not yet withdrawn the notifications shall do it forthwith. So far as the practical difficulties highlighted are concerned, it is for the State Governments concerned to make necessary arrangements to ensure that the difficulties highlighted can be suitably remedied by the State Government themselves without in any way overstepping statutory prescriptions."

The Apex Court has thus held that permitting the overloaded vehicles to ply on the public road after composition of the offence punishable under Section 194 would amount to fresh commission of offence in terms of Section 113(3) of the Act. The State ,thus, cannot permit carriage of the excess weight to ply on the public road after compounding.,

14. In the light of the above in the facts of the present case, it may be noted that vide circular dated 30th October, 2015, a mechanism had been evolved to curb the menace of overloaded vehicles plying on the public roads which have resulted in significant damage to the road surface, cause pollution through auto-emissions and are safety hazards not only for themselves but also for other road users.

15. Taking note of the increase in road accidents due to overloaded vehicles on the National Highways and the State Highways, it was resolved in the meeting held on 28.10.2015 under the Chairmanship of the Minister of Public Works Department that effective steps have to be taken for regulating the problem of overloading in the State of U.P. The direction was then issued by the Transport Commissioner, U.P., Lucknow in view of the said resolution by means of the circular dated 30th October, 2015 to all Regional Transport Authorities (Enforcement) authorising them to get the data from the toll plazas regarding overweight vehicles. For compliance of the above directions, communications were issued from time to time and the procedure of issuance of e-challan on the basis of the data collected from the toll plazas had been set in operation since the year 2015.

As there is no challenge to the circular dated 30.10.2015 (which has been filed alongwith the counter affidavit), the plea of the petitioners that retrospective effect has been given to the office order dated 22.5.2020 by the U.P. Transport Commissioner is liable to be rejected.

16. As regards, the jurisdiction of the Regional Transport Authorities (Enforcement) to issue e-challan on the

basis of the data of overloaded vehicles provided by the toll plazas, we may note that the Regional Transport Officer (Enforcement) has been empowered to intercept the plying of overloaded vehicles in contravention of sub-section (3). The weighing devices and the installation or use of such devices for the purpose of Section 113 has been described in Rule 181 of clause (ii). Three kind of devices have been recognized in sub-rule (1) of Rule 181 which include a portable wheel-weigher of any kind approved by the State Government. The power of the State Government to control road transport has been given in Section 67 of the Act, wherein it can issue directions, from time to time, both to the State Transport Authority and the Regional Transport Authority by issuing notification in the Official Gazette. Under Section 68 of the Act, a State Transport Authority is constituted by the State Government to exercise and discharge the powers and functions specified in sub-section (3) of the said section. The power of the State Transport Authority described in sub-section (3) of Section 68 reads as under:-

*"**3**. The State Transport Authority and every Regional Transport Authority shall give effect to any directions issued under section 67 and the State Transport Authority shall, subject to such directions and save as otherwise provided by or under this Act, exercise and discharge throughout the State the following powers and functions, namely:- -*

(a) to co-ordinate and regulate the activities and policies of the Regional Transport Authorities, if any, of the State;

(b) to perform the duties of a Regional Transport Authority where there is no such Authority and, if it thinks fit or if so required by a Regional Transport Authority, to perform those duties in respect of any route common to two or more regions;

(c) to settle all disputes and decide all matters on which differences of opinion arise between Regional Transport Authorities; and

(ca) Government to formulate routes for plying stage carriages;]

(d) to discharge such other functions as may be prescribed"

It has been brought on record that the weigh-in-motion machines installed at the toll plazas established under the National Highways Act are certified by the Controller, Weights and Measures Department which is the competent authority to issue a license in such matters. The stand of the respondent no. 2 (the Transport Commissioner, U.P., Lucknow) that the weighing machines installed in the toll plazas are covered by Rule 181 of U.P. Motor Vehicle Rules, 1998 is found justifiable from the reading of the Rule 181 of the Rules.

17. The challenge to the jurisdiction of the Regional Transport Authorities to issue e-challan on the basis of the data of overload vehicles passed through weigh-in-motion machines installed at the toll plazas of National Highways Authority of India is, thus, found baseless. The Transport Commissioner, U.P., Lucknow being the State Transport Authority is empowered to give effect to the directions issued by the State Government under Section 67 of the Act and to exercise and discharge such powers and functions which are necessary to coordinate and regulate the activities and policies of the Regional Transport Authorities.

18. In view of the above, the weigh-in-motion machines installed at the toll plazas being accredited by the competent authority i.e. the Controller, Weights and

Measures and the Metrology Department, it cannot be said that they are not certified weighing devices within the meaning of Rule 181 of the Rules, 1998.

The records indicate that the statement of "allowed weight", "vehicle weight" and "overweight" had been given to the driver of the vehicle with the relevant details indicating the date and time of journey at the toll plaza itself. It, therefore, cannot be said that the driver or the person incharge of the vehicle had not been given statement in writing of the weight of the vehicle as is required under sub-rule (5) of Rule 181.

19. Moreover, there is no challenge to the accuracy of the weighing devices in accordance with the provisions of sub-rule (6) of Rule 181 which gives right to the driver of a vehicle to make a statement in writing to challenge the accuracy of the weighing device; (i) Within one hour of the receipt of the statement referred to in sub-rule (5) of the rule vehicle being overweight, or (ii) Within fifteen days of the service of notice of the proceeding (of challan) against him under Section 86 or Section 113.

The challenge to the accuracy of the weight measured by the weigh-in-motion machines installed at the toll plazas indicated in the e-challans issued by the Regional Transport Authorities ,therefore, cannot be sustained.

In view of the above discussion, the prayers in the writ petition are found misconceived.

20. However, before parting with the judgment, it is pertinent to note that there is nothing on record which would indicate as to whether any action had been taken by the Regional Transport Authorities (Enforcement section of the Transport Department) to intercept the vehicles which were found overloaded at the toll plazas. It seems that after payment of the overweight charge of Rs. 150/-at the toll plaza , the overweight vehicles were allowed to be plied on the public roads. The e-challans for the statement of overloaded vehicle weighed at various toll plazas in the month of January, 2020 were issued in June, 2020.

The penalty or compounding fee for the offence committed under Section 194 of the Act had been imposed by the e-challan while initiating proceedings under the Motor Vehicles Act.

It is, thus, clear that the offence for which the compounding fee was imposed had been allowed to be continued beyond the toll plaza. No notification of the State Government to address the said issue has been brought before the Court.

The said inaction of the State Government is nothing but violations of the categorical directions issued by the Apex Court in the case of Paramjit Bhasin (supra).

21. It is to be noted that it is the bounden duty of the officers of the Motor Vehicles Department authorized by the State Government to ensure the compliance of the mandatory provisions of the Act. Section 114 read with Section 194 of the Act clearly provides that if on weighment the vehicle is found to contravene in any respect the provisions of section 113 regarding weight, by an order in writing, the officer of the Motor Vehicles Department shall direct the driver to off-load the excess weight at his own risk and will not allow him to remove the vehicle

from that place until the laden weight has been reduced and that the liability to pay charges of off-loading of excess weight has to be paid by the driver or the person incharge of the vehicle. The inaction of the Regional Transport Authorities to ensure compliance of Section 114 (1) of the Act read with Section 194(1) is, thus, writ large on the face of the record.

22. The State Government is, therefore, directed to issue necessary notification to remove this discrepancy so as to comply with the directions of the Apex Court in **Paramjit Bhasin** (supra) in confirmity with the Motor Vehicles Act and the rules framed thereunder.

23. The answering respondent namely the State Transport Commissioner, U.P., Lucknow, is, therefore, directed to bring this order to the knowledge of the State Government.

24. A copy of this order shall also be sent to the Principal Secretary, Transport Office, Government of U.P., Lucknow through the Registrar General, High Court, Allahabad for intimation.

25. The compliance of this order shall be intimated by the Principal Secretary concerned to the Registrar General, High Court, Allahabad within a period of one month of from the date of the communication for record of this Court.

With the above observations and directions, the writ petition is dismissed.

(2021)06ILR A671
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.03.2021

BEFORE

THE HON'BLE AJAY BHANOT, J.

Writ-A No. 8313 of 2020

Riyasat Ali ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Rajesh Yadav

Counsel for the Respondents:
G.A., Sri Vikram Bahadur Yadav, S.C.

A. Service Law – Appointment/Selection – Indian Penal Code,1860 - Sections 306, 307, 506, 323, 324, 504 - Examination of suitability of candidates for appointment - Role of Criminal Antecedents - Verification of character and antecedents is one of the important features in service jurisprudence so as to find out whether a selected candidate is suitable to the post. The purpose of the enquiry is to determine suitability of a candidate to hold office. The police is a disciplined force which is charged with the duty to uphold the law and order in the State. Personnel in uniform belonging to disciplined forces, are expected to bear impeccable character and possess unimpeachable integrity. Adherence to these standards is essential to enable them to discharge their duties effectively, and retain the confidence of the public at large. (Para 22)

Criminal antecedents are accepted in law as reliable guides for an employer to assess character traits and evaluate the suitability of a candidate for appointment. (Para 25)

B. Nature of proceeding/Scope of Enquiry into sustainability for appointment – Determination of suitability of a candidate for appointment is an administrative decision which is part of the recruitment process. The process of evaluating suitability for appointment is not an adjudication of guilt or innocence as in a criminal case. Nor is it a quasi judicial process or a civil law proceeding. (Para 26)

C. Material for consideration by the authority – In public employment, it is

inherent to acquire diverse material from different sources for formation of opinion in regard to the suitability of a candidate. This material may be reliable and conclusive or credible but probative. Both kinds of material are liable to be considered. One such source is the record of criminal proceedings against the candidate. (Para 27 to 29)

D. Method of Evaluation of Material/applicability of Standards of Evidence – While the standard of proof in a criminal case is the proof beyond all reasonable doubt, the proof in a departmental proceeding is preponderance of probabilities. An acquittal based on benefit of doubt would not stand on a par with a clean acquittal on merit after a full-fledged trial, where there is no indication of the witnesses being won over. (Para 38)

Weight is given by judicial authorities to the nature of acquittal over the mere fact of acquittal. Acquittals are classified different categories-honourable acquittal, acquittal as if the prosecution did not happen, acquittal on benefit of doubt, acquittal on account of witnesses turning hostile. When the accused is acquitted after full consideration of the prosecution case and the prosecution miserably fails to prove the charges levelled against the accused, it can possibly be said that the accused was honourably acquitted. (Para 35, 38)

Acquittal by the Criminal Court happens when evidence is not sufficient to sustain a conviction. Failure to prove an offence before a Court of law in a criminal trial may not reduce the probative value of said evidence before the competent authority in a recruitment process. Such evidence when placed before the competent authority may constitute credible material of probative value to render a candidate unsuitable for appointment. The scope of discretion of the competent authority will also depend on the nature of findings of the Court on the same evidence. The employer can take into consideration all relevant facts to take an appropriate decision as to the fitness of an incumbent for appointment/continuance in service**. It is thus well-settled that acquittal in a criminal case does not automatically entitle him for appointment to the post.**. (Para 34, 40, 42)

In service matters the consequences of an acquittal by a Criminal Court have to be applied in a nuanced manner and not in a pedantic fashion. The competent authority is not always bound by the findings of the Court, nor is it invariably constrained by the opinion of the investigation officer. Criminal prosecution of an individual before the Court of law is to bring an offender of criminal laws to justice, and to punish the guilty. The object of the competent authority in a recruitment process is only to determine the suitability of a candidate to hold a public post. (Para 30, 32, 39, 51)

E. The duty of an employer to evaluate the suitability of a candidate for appointment is paired with the right of the candidate for a fair consideration of his credentials. Selected candidates do not acquire an indefeasible right to be appointed. **The authority has to adopt a procedure which is consistent with principles of natural justice.** Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. (Para 46, 48, 53 to 57, 71)

F. Line of Enquiry – Aggravating and mitigating factors – Gravity and heinous nature of offence or offences involving moral turpitude, multiplicity of criminal prosecutions, inference of criminal traits or tendency of involvement in criminal offences are aggravating factors. Whereas, indiscretions of youth and fallibility of human nature are mitigating factors. (Para 60 to 68)

Failure to disclose past criminal prosecutions in the affidavit of verification ipso facto will not lead to automatic

cancellation of appointment. The authority has to independently consider the consequences of suppression of facts in each case. **Equally disclosure of criminal cases by a candidate cannot guarantee appointment**. The impact of criminal antecedents on the suitability for appointment has to investigated in the manner consistent with the preceding narrative. (Para 70)

In the facts of this case, the acquittal of the petitioner cannot be held to be honourable. The multiplicity of criminal cases constitute aggravating circumstances which compelled the competent authority to find against the petitioner. Further the crime was of a heinous nature. The manner of consideration of the aforesaid material by the competent authority in the impugned is lawful and the conclusions are reasonable. Material furnished by the above said case alone was sufficient to support the finding of the competent authority regarding the non-suitability of the petitioner for appointment. (Para 78, 79, 86)

Writ petition dismissed. (E-3)

Precedent followed:

1. Avtar Singh Vs U.O.I. & ors., (2016) 8 SCC 471 (Para 20)

2. Commissioner of Police, New Delhi & ors. Vs Mehar Singh, (2013) 7 SCC 685 (Para 23)

3. B. Ramakrishna Yadav & ors. Vs The Superintendent of Police & ors. , AIR 2016 AP 147 (Para 26)

4. R.P. Kapur Vs U.O.I., AIR 1964 SC 787 (Para 36)

5. Management of R.B.I. Vs Bhopal Singh Panchal, 1994 (1) SCC 541 (Para 37)

6. Inspector General of Police Vs S. Samthiram, (1994) 1 SCC 541 (Para 38)

7. Union Territory, Chandigarh Administration & ors. Vs Pradeep Kumar & ors., (2018) 1 SCC 797 (Para 40)

8. St. of M. P. Vs Parvez Khan, (2015) 2 SCC 591 (Para 41)

9. St. of M. P. Vs Abhijit Singh Pawar, (2018) 18 SCC 733 (Para 41)

10. St. of M.P. Vs Bunty, 2019 SCC OnLine SC 430 (Para 42)

11. Shankarshan Das Vs U.O.I., 1991 (3) SCC 47 (Para 48)

12. State of Bihar Vs The Secretariat Assistant Successful Examinees Union, 1994 (1) SCC 126 (Para 49)

13. Mohammad Imran Vs St. of Mah., 2019 (17) SCC 696 (Para 53)

14. Commissioner of Police & ors. Vs Sandeep Kumar, 2011 (4) SCC 644 (Para 65)

15. St. of Raj. & ors. Vs Love Kush Meena, (2021) SCC OnLine 252 (Para 76)

Books Referred:

1. Stroud's Judicial Dictionary, Fifth Edition, by John S. James (Para 13)

Present petition assails order dated 01.06.2019, passed by Superintendent of Police, Rampur.

(Delivered by Hon'ble Ajay Bhanot, J.)

1. The petitioner has assailed the order dated 01.06.2019 passed by respondent no. 4- Superintendent of Police, Rampur, cancelling his selection as Constable in the U.P. Police.

2. The judgment is being structured in the following conceptual framework to facilitate the discussion:

I.	Introduction
II.	Submissions of learned counsels
III.	Facts

IV.	Legal perspectives		
	IV. i.	**Examination of suitability of candidates for appointment**	
		A	Material for formation of opinion before the authority
		B	Nature of proceedings
		C	Standard of evidence & Impact of chargesheet
		D	Procedure of enquiry
	IV. ii	**Line of Enquiry by the authorities**	
		A.	Consideration of criminal cases
		B.	Mitigating factors
	IV. iii	**Decision of the authority**	
V.	Analysis of facts and conclusions		

I. Introduction:

3. The recruitment process for various posts in the U.P. Police was initiated by notification no. PRPB-1(82)/2015. The petitioner applied in response to the said notification and participated in the selection process. The petitioner was selected for appointment to the post of Constable in the UP Police.

4. The declaration made by the petitioner in the affidavit of verification on 11.06.2018 during the recruitment process disclosed following criminal cases:

"1. मु0 अ0 स0-150/2013, धारा-506 आई0 पी0 सी0 थाना टांडा रामपुर, सरकार बनाम बब्बू खां आदि न्यायालय श्रीमान मुख्य न्यायिक मजिस्ट्रेट महोदय, रामपुर ।

2. मु0 अ0 स0-186/2017, धारा-323, 324, 504, 506 आई0 पी0 सी0 थाना टांडा रामपुर, सरकार बनाम रियासत आदि न्यायालय श्रीमान मुख्य न्यायिक मजिस्ट्रेट महोदय, रामपुर ।"

5. The petitioner was denied appointment as Constable. Being aggrieved the petitioner approached this Court by instituting a writ petition, registered as ***Writ A No. 18058 of 2018 Riyasat Ali Vs. State of U.P. and Others***. The operative portion of the judgment in ***Riyasat Ali (supra)*** dated 24.08.2018 is extracted hereinunder:

"Considering the facts and circumstances, noticed above, this petition stands disposed of, permitting the petitioner to approach the authority concerned, i.e., respondent no. 4, in respect of his grievance raised before this Court, within a period of two weeks from the date of presentation of certified copy of this order. The petitioner shall be at liberty to annex all materials in support of his claim. In case such material is placed before the authority concerned, the same shall be examined, in accordance with law, and keeping in view the law laid down by Apex Court in Avtar Singh (supra). The required consideration shall be made by the authority concerned within a period of three months thereafter. "

6. In compliance of the said judgment dated 24.08.2018 rendered by this Court, the suitability of the petitioner for appointment as constable in the U.P. Police was decided by the impugned order dated 01.06.2019.

II. Submissions of learned counsels:

7. Shri Rajesh Yadav, learned counsel for the petitioner contends that the petitioner had truthfully declared details of all the criminal cases pending against him in the affidavit of verification. The petitioner was falsely nominated as Case Crime No. 0150 of 2013 in which a chargesheet under Section 306 I.P.C. was filed against the petitioner. The acquittal of the petitioner in the said case, after the impugned order was passed requires a fresh consideration of the controversy. The

petitioner was acquitted in the second case by the learned trial court. The authority has not adopted any standard of evidence while considering the material against the petitioner. In absence of conviction by a court, appointment cannot be refused. The petitioner has been honourably acquitted in both criminal cases.

8. Per contra, Shri Vikram Bahadur Yadav, learned Standing Counsel for the State of U.P. submits that the petitioner was named in multiple criminal cases. The petitioner was not acquitted honourably by the trial court both the criminal cases. The material furnished by the said criminal cases was reliable and duly considered in the impugned order. The material in the record before the authority disclosed involvement of the petitioner in serious criminal offences.

9. The competent authority gave full consideration to all material facts in the right perspective. The conclusions of the competent authority in the impugned order are reasonable. Persons with such criminal profiles are not fit for appointment in the police force.

10. Heard learned counsel for the parties.

III. Facts of the case and the impugned order:

11. The undisputed facts necessary for adjudication of this controversy can be prised out from the impugned order.

12. The affidavit sworn by the petitioner disclosing the criminal prosecutions faced by him was part of the recruitment process. The impugned order dated 01.06.2019 noticing the said affidavit records the following criminal cases were registered against the petitioner :

"**A**. Case Crime No. 150/13, Section 307/506 I.P.C., and;

B. Case Crime No. 186/17, Sections 323, 324, 504, 506 I.P.C."

13. In wake of the Government Order dated 28.04.1958, the competent authority sought the opinion of the District Magistrate in the matter of criminal antecedents of petitioner and his suitability for appointment. The impugned order referencing the report of the District Magistrate dated 30.06.2018.

14. The criminal cases are thereafter discussed in context of the claim of the petitioner for appointment. A criminal case was registered against the petitioner as Case Crime No. 150/13, under Sections 307 and 506 I.P.C. at Police Station Tanda. The offences disclosed against the petitioner at the registration of the case are grave in nature. After investigation, a chargesheet under Section 506 I.P.C. was filed and the matter is pending before the learned trial court.

15. The second criminal case, registered as Case Crime No. 186/17, under Sections 323, 324, 504, 506 I.P.C. and tried as Criminal Case No. 5101 of 2017, State Vs. Riyasat and others, was then considered. In the said the petitioner had been acquitted by the learned trial court.

16. The impugned order notices that the prosecution case asserts that the petitioner had attacked the complainant in his stomach with a knife; and the right hand fingers of the latter were severed in the assault. After inflicting the injuries, the petitioner in the ensuing commotion escaped along with other accused persons, but only after threatening the complainant with death.

17. The competent authority finds that the acquittal was the result of prosecution witnesses turning hostile, and compromise arrived at between the parties. The competent authority in the impugned order thereafter concludes that the aforesaid criminal cases reveal criminal traits which render him unsuitable for appointment as Constable in the U.P. Police.

18. The narrative in the impugned order takes support of various authorities rendered by the Supreme Court to fortify the said findings, while rejecting the case of the petitioner for appointment.

Subsequent event:

19. The petitioner has also brought some subsequent developments relevant to the controversy in the record of the writ petition. It is asserted that criminal case registered as Case Crime No. 150 of 2013 went to trial as Criminal Case No. 7410 of 2014. The petitioner has been acquitted in the said criminal case by the learned trial court by the judgment rendered on 07.02.2020.

IV. Legal perspective:

IV.i. Examination of suitability of candidates for appointment : Role of Criminal Antecedents:

20. The impact of criminal antecedents on the appointment of a selected candidate was crystallized in ***Avtar Singh v. Union of India and Others***1. However, the submissions made at the bar expand the scope of the controversy and require consideration of the contours and nature of an enquiry by the competent authority into the criminal antecedents of the candidate and its bearing on appointment.

21. The purpose and subject matter of the proceeding, the rights engaged, material for consideration, and consequences of the decision, decide the nature of the enquiry and procedure to be adopted.

22. The purpose of the enquiry is to determine suitability of a candidate to hold office. The police is a disciplined force which is charged with the duty to uphold the law and order in the State. Personnel in uniform belonging to disciplined forces, are expected to bear impeccable character and possess unimpeachable integrity. Adherence to these standards is essential to enable them to discharge their duties effectively, and retain the confidence of the public at large.

23. The narrative will be fortified by reference to judicial authorities in point. The need for appointing persons of untarnished character in the police force was underscored in ***Commissioner of Police, New Delhi and others Vs. Mehar Singh***2

"The police force is a disciplined force. It shoulders the great responsibility of maintaining law and order and public order in the society. People repose great faith and confidence in it. It must be worthy of that confidence. A candidate wishing to join the police force must be a person of utmost rectitude. He must have impeccable character and integrity. A person having criminal antecedents will not fit in this category. Even if he is acquitted or discharged in the criminal case, that acquittal or discharge order will have to be examined to see whether he has been completely exonerated in the case because even a possibility of his taking to the life of crimes poses a threat to the discipline of the police force. The Standing Order, therefore,

has entrusted the task of taking decisions in these matters to the Screening Committee. The decision of the Screening Committee must be taken as final unless it is mala fide. In recent times, the image of the police force is tarnished. Instances of police personnel behaving in a wayward manner by misusing power are in public domain and are a matter of concern. The reputation of the police force has taken a beating. In such a situation, we would not like to dilute the importance and efficacy of a mechanism like the Screening Committee created by the Delhi Police to ensure that persons who are likely to erode its credibility do not enter the police force. At the same time, the Screening Committee must be alive to the importance of trust reposed in it and must treat all candidates with even hand."

24. In ***B. Ramakrishna Yadav and others Vs. The Superintendent of Police and others***,3 the Full Bench of Hon'ble High Court of Andhra Pradesh held:

"Verification of character and antecedents is one of the important features in service jurisprudence so as to find out whether a selected candidate is suitable to the post. Having regard to the antecedents of a candidate, if appointing authority finds that it is not desirable to appoint such person, in particular to a discipline force, it can deny employment or even terminate such person, if appointed, within the shortest possible time from the date of verification of character and antecedents. This has to be scrupulously followed in case of recruitment in police force, it being a disciplined force. As observed by the Supreme Court in Mehar Singh (supra), people repose great faith and confidence in the police force, and therefore, the selected candidate must be of confidence, impeccable character and integrity. A person having criminal antecedents is, undoubtedly, not fit in this category, more particularly when he has suppressed the information about his involvement in criminal case(s) irrespective of the fact whether the case was pending or he was acquitted."

25. Criminal antecedents are thus accepted in law as reliable guides for an employer to assess character traits and evaluate the suitability of a candidate for appointment.

IV.i.-B. Nature of the proceeding/Scope of Enquiry into suitability for appointment:

26. Determination of suitability of a candidate for appointment is an administrative decision which is part of the recruitment process. The process of evaluating suitability for appointment is not an adjudication of guilt or innocence as in a criminal case. Nor is it a quasi judicial process or a civil law proceeding.

IV.i-A. Material for consideration by the authority.

27. In public employment diverse material for formation of opinion in regard to the suitability of a candidate is acquired from different sources.

28. The diversity of material available with the authority to form its opinion is inherent in the process of determining the suitability of the candidate. The material before the authority may be reliable and conclusive or credible but probative. Both kinds of material are liable to be considered. Material of probative value but credible worth is not to be discarded, and there is no impediment in its consideration.

29. One such source is the record of criminal proceedings against the candidate. The full inventory of material before the authority includes the F.I.R., the evidence collected during the criminal investigation, chargesheet submitted in court, evidence emerging during the trial, the judgment rendered by a court of law. On the foot of such material, the competent authority can make its decision on the fitness of the candidate for appointment.

IV.i.-C. <u>Method of Evaluation of Material/ applicability of Standards of evidence:</u>

30. The competent authority is not always bound by the findings of the court, nor is it invariably constrained by the opinion of the investigation officer. The reasons are not far to seek.

31. The purposes of a criminal investigation, criminal trial, civil proceeding, departmental enquiry, are distinct from the rationale behind the exercise of verification of criminal antecedents of a candidate for appointment in a recruitment process. The nature of rights engaged in the respective proceedings are also different. The lattermost proceeding is an executive function, while former proceedings are judicial and quasi judicial in nature respectively.

32. Criminal prosecution of an individual before the court of law is to bring an offender of criminal laws to justice, and to punish the guilty. The object of the competent authority in a recruitment process is only to determine the suitability of a candidate to hold a public post.

33. Secondly, strict rules of evidence apply to criminal prosecution. The prosecution can succeed only when it attains the standard of evidence which proves the guilt of the accused beyond reasonable doubt. The competent authority on the contrary is not constrained by any such standard of evidence.

34. Acquittal by the criminal court happens when evidence is not sufficient to sustain a conviction. Failure to prove an offence before a court of law in a criminal trial may not reduce the probative value of said evidence before the competent authority in a recruitment process. Such evidence when placed before the competent authority may constitute credible material of probative value to render a candidate unsuitable for appointment. The scope of discretion of the competent authority will also depend on the nature of findings of the court on the same evidence.

35. Weight is given by judicial authorities to the nature of acquittal over the mere fact of acquittal. Cases in point accordingly classify acquittals in different categories-honourable acquittal, acquittal as if the prosecution did not happen, acquittal on benefit of doubt, acquittal on account of witnesses turning hostile.

36. An acquittal in a criminal trial simplicitor will not lead to an automatic discharge in departmental proceedings. This proposition was enunciated in ***R.P. Kapur vs. Union of India (UOI)***4 in the following terms:

"9... Take again the case where suspension is pending criminal proceedings. The usual ground for suspension pending a criminal proceeding is that the charge is connected with his position as a government servant or is likely to embarrass him in the discharge of his duties or involves moral turpitude. In

such a case a public servant may be suspended pending investigation, enquiry or trial relating to a criminal charge. Such suspension also in our opinion is clearly related to disciplinary matters. ***If the trial of the criminal charge results in conviction, disciplinary proceedings are bound to follow against the public servant so convicted, even in case of acquittal proceedings may follow where the acquittal is other than honourable***. The usual practice is that where a public servant is being tried on a criminal charge, the Government postpones holding departmental enquiry and awaits the result of the criminal trial and departmental proceedings follow on the result of the criminal trial. Therefore, suspension during investigation, enquiry or trial relating to a criminal charge is also in our opinion intimately related to disciplinary matters. We cannot therefore accept the argument on behalf of the respondent that suspension pending a departmental enquiry or pending investigation, enquiry or trial relating to a criminal charge is not a disciplinary matter within the meaning of those words in Article 314..... (emphasis supplied)

37. The distinction between honourable acquittal and acquittal based on benefit of doubt was considered in relation to the right to reinstatement in service and other service benefits in ***Management of Reserve Bank of India Vs. Bhopal Singh Panchal***5, by laying down the law as under:

"13.....When the High Court acquitted the respondent-employee by its order of November 21, 1977 giving the benefit of doubt, the Bank rightly refused to reinstate him in service on the ground that it was not an honourable acquittal as required by Regulation 46(4).

15.... It is only if such employee is acquitted of all blame and is treated by the competent authority as being on duty during the period of suspension that such employee is entitled to full pay and allowances for the said period."

38. ***Commissioner of Police, New Delhi Vs. Mehar Singh***6 attempted to define the expression "honourable acquittal" after acknowledging that the term often eludes precise definition. **Mehar Singh (supra)** after placing reliance on the law laid down in ***Inspector General of Police Vs. S. Samuthiram****7,* ***and RBI vs. Bhopal Singh Pancha***l8 held:

"24. We find no substance in the contention that by cancelling the respondents' candidature, the Screening Committee has overreached the judgments of the criminal court. We are aware that the question of co-relation between a criminal case and a departmental enquiry does not directly arise here, but, support can be drawn from the principles laid down by this Court in connection with it because the issue involved is somewhat identical, namely, whether to allow a person with doubtful integrity to work in the department. While the standard of proof in a criminal case is the proof beyond all reasonable doubt, the proof in a departmental proceeding is preponderance of probabilities. Quite often criminal cases end in acquittal because witnesses turn hostile. Such acquittals are not acquittals on merit. An acquittal based on benefit of doubt would not stand on a par with a clean acquittal on merit after a full-fledged trial, where there is no indication of the witnesses being won over. In R.P. Kapur v. Union of India [AIR 1964 SC 787] this Court has taken a view that departmental proceedings can proceed even

though a person is acquitted when the acquittal is other than honourable.

25. The expression "honourable acquittal" was considered by this Court in **S. Samuthiram [Inspector General of Police v. S. Samuthiram, (2013) 1 SCC 598 : (2013) 1 SCC (Cri) 566** : (2013) 1 SCC (L&S) 229] . In that case this Court was concerned with a situation where disciplinary proceedings were initiated against a police officer. Criminal case was pending against him under Section 509 IPC and under Section 4 of the Eve-Teasing Act. He was acquitted in that case because of the non-examination of key witnesses. There was a serious flaw in the conduct of the criminal case. Two material witnesses turned hostile. Referring to the judgment of this Court in **RBI v. Bhopal Singh Panchal [(1994) 1 SCC 541 : 1994 SCC (L&S) 594 : (1994) 26 ATC 619**] , where in somewhat similar fact situation, this Court upheld a bank's action of refusing to reinstate an employee in service on the ground that in the criminal case he was acquitted by giving him benefit of doubt and, therefore, it was not an honourable acquittal, this Court held that the High Court was not justified in setting aside the punishment imposed in the departmental proceedings. This Court observed that the expressions "honourable acquittal", "acquitted of blame" and "fully exonerated" are unknown to the Criminal Procedure Code or the Penal Code. They are coined by judicial pronouncements. It is difficult to define what is meant by the expression "honourably acquitted". This Court expressed that when the accused is acquitted after full consideration of the prosecution case and the prosecution miserably fails to prove the charges levelled against the accused, it can possibly be said that the accused was honourably acquitted.

33. So far as respondent Mehar Singh is concerned, his case appears to have been compromised. It was urged that acquittal recorded pursuant to a compromise should not be treated as a disqualification because that will frustrate the purpose of the Legal Services Authorities Act, 1987. We see no merit in this submission. Compromises or settlements have to be encouraged to bring about peaceful and amiable atmosphere in the society by according a quietus to disputes. They have to be encouraged also to reduce arrears of cases and save the litigants from the agony of pending litigation. But these considerations cannot be brought in here. In order to maintain integrity and high standard of police force, the Screening Committee may decline to take cognizance of a compromise, if it appears to it to be dubious. The Screening Committee cannot be faulted for that.

34. The respondents are trying to draw mileage from the fact that in their application and/or attestation form they have disclosed their involvement in a criminal case. We do not see how this fact improves their case. Disclosure of these facts in the application/attestation form is an essential requirement. An aspirant is expected to state these facts honestly. Honesty and integrity are inbuilt requirements of the police force. The respondents should not, therefore, expect to score any brownie points because of this disclosure. Besides, this has no relevance to the point in issue. It bears repetition to state that while deciding whether a person against whom a criminal case was registered and who was later on acquitted or discharged should be appointed to a post in the police force, what is relevant is the nature of the offence, the extent of his involvement, whether the acquittal was a clean acquittal or an acquittal by giving benefit of doubt because the witnesses

turned hostile or because of some serious flaw in the prosecution, and the propensity of such person to indulge in similar activities in future. This decision, in our opinion, can only be taken by the Screening Committee created for that purpose by the Delhi Police. If the Screening Committee's decision is not mala fide or actuated by extraneous considerations, then, it cannot be questioned.

35. The police force is a disciplined force. It shoulders the great responsibility of maintaining law and order and public order in the society. People repose great faith and confidence in it. It must be worthy of that confidence. A candidate wishing to join the police force must be a person of utmost rectitude. He must have impeccable character and integrity. A person having criminal antecedents will not fit in this category. Even if he is acquitted or discharged in the criminal case, that acquittal or discharge order will have to be examined to see whether he has been completely exonerated in the case because even a possibility of his taking to the life of crimes poses a threat to the discipline of the police force. The Standing Order, therefore, has entrusted the task of taking decisions in these matters to the Screening Committee. The decision of the Screening Committee must be taken as final unless it is mala fide. In recent times, the image of the police force is tarnished. Instances of police personnel behaving in a wayward manner by misusing power are in public domain and are a matter of concern. The reputation of the police force has taken a beating. In such a situation, we would not like to dilute the importance and efficacy of a mechanism like the Screening Committee created by the Delhi Police to ensure that persons who are likely to erode its credibility do not enter the police force. At the same time, the Screening Committee must be alive to the importance of the trust reposed in it and must treat all candidates with an even hand."

39. The concept of various categories of acquittals in criminal cases thus evolved by courts, in the context of service law jurisprudence for the purposes of determining suitability for appointment or continuance in service. In service matters the consequences of an acquittal by a criminal court have to be applied in a nuanced manner and not in a pedantic fashion.

40. In ***Union Territory, Chandigarh Administration and Others Vs. Pradeep Kumar and Others***9, while holding that an acquittal in a criminal case was not conclusive of a candidate's suitability for appointment it was stated:

"13. It is thus well settled that acquittal in a criminal case does not automatically entitle him for appointment to the post. Still it is open to the employer to consider the antecedents and examine whether he is suitable for appointment to the post. From the observations of this Court in Mehar Singh [Commr. of Police v. Mehar Singh, (2013) 7 SCC 685 : (2013) 3 SCC (Cri) 669 : (2013) 2 SCC (L&S) 910] and Parvez Khan [State of M.P. v. Parvez Khan, (2015) 2 SCC 591 : (2015) 1 SCC (L&S) 544] cases, it is clear that a candidate to be recruited to the police service must be of impeccable character and integrity. A person having criminal antecedents will not fit in this category. Even if he is acquitted or discharged, it cannot be presumed that he was honourably acquitted/completely exonerated. The decision of the Screening Committee must be taken as final unless it is shown to be mala fide. The Screening Committee also must be alive to the

importance of the trust reposed in it and must examine the candidate with utmost character.

15. From the above details, we find that the Screening Committee examined each and every case of the respondents and reasonings for their acquittal and taken the decision. While deciding whether a person involved in a criminal case has been acquitted or discharged should be appointed to a post in a police force, nature of offence in which he is involved, whether it was an honourable acquittal or only an extension of benefit of doubt because of witnesses turned hostile and flaws in the prosecution are all the aspects to be considered by the Screening Committee for taking the decision whether the candidate is suitable for the post. As pointed out earlier, the Screening Committee examined each and every case and reasonings for their acquittal and took the decision that the respondents are not suitable for the post of Constable in Chandigarh Police. The procedure followed is as per Guideline 2(A)(b) and object of such screening is to ensure that only persons with impeccable character enters police force. While so, the court cannot substitute its views for the decision of the Screening Committee."

41. Following various decisions including in ***Mehar Singh (Supra), State of Madhya Pradesh Vs. Parvez Khan***10, the Supreme Court in ***State of Madhya Pradesh Vs. Abhijit Singh Pawar***11, reiterated the said propositions of law.

42. More recently in line with the said authorities, the Supreme Court in ***State of M.P. Vs. Bunty***12 unequivocally set forth as under:

"13. The law laid down in the aforesaid decisions makes it clear that in case of acquittal in a criminal case is based on the benefit of the doubt or any other technical reason. The employer can take into consideration all relevant facts to take an appropriate decision as to the fitness of an incumbent for appointment/continuance in service. The decision taken by the Screening Committee in the instant case could not have been faulted by the Division Bench."

43. The value of a chargesheet submitted by an Investigation Officer in a court, for the authority considering the suitability of candidate for appointment would now merit consideration.

44. The chargesheet submitted before the court is the result of criminal investigation by the Investigation Officer. During investigation of a criminal case the Investigation Officer has to be responsive to the standard of evidence required in a criminal trial. For the competent authority nomination or omission to name a person in a chargesheet, is at best an opinion of the Investigation Officer. Absent nomination as an accused in a chargesheet, or even a clean chit by an Investigation Officer, ipso facto does not create an entitlement for appointment. The opinion of the Investigation Officer will deserve respect, but it does not foreclose the discretion of the authority. The competent authority may for good reason based on material in the record form a different opinion in the matter of fitness for appointment.

45. In civil proceedings and departmental enquiries, the standard of evidence employed to prove a fact is preponderance of probabilities. The rights of a government employee facing departmental proceedings are significantly different from a candidate who is

participating in a selection process. The evidentiary standard of preponderance of probability is not applicable to the proceedings which consider the suitability of a candidate before making the appointment.

46. The duty of an employer to evaluate the suitability of a candidate for appointment is paired with the right of the candidate for a fair consideration of his credentials.

47. Rights of selected candidates have been settled by good authority.

48. In ***Shankarshan Das Vs. Union of India****13*, the rights of candidates in a recruitment process were posited for determination. Selected candidates do not acquire an indefeasible right to be appointed was the principle holding in ***Shankarshan Das (supra)***, which is set out hereunder:

"7. It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note in the decisions in State of Haryana v. Subash Chander Marwaha [(1974) 3 SCC 220 : 1973 SCC (L&S) 488 : (1974) 1 SCR 165] , Neelima Shangla v. State of Haryana [(1986) 4 SCC 268 : 1986 SCC (L&S) 759] , or Jatinder Kumar v. State of Punjab [(1985) 1 SCC 122 : 1985 SCC (L&S) 174 : (1985) 1 SCR 899]."

49. ***State of Bihar Vs. The Secretariat Assistant Successful Examinees Union***14 fortifies the said proposition of law.

50. Reception of evidence is invariably required when the fact finder is required to achieve the two standards of evidence discussed above. Insistence on the said standards of evidence would demand introduction of evidence in decisions made in the recruitment process. This is fraught with serious consequences. The recruitment process would be quagmired in legal adjudications and disputes. The nature of rights of selected candidates does not permit adoption of the aforesaid standards of evidence.

51. To sum up, the authority while determining the suitability of a candidate for public employment is not required to reach the level of evidentiary standards demanded of the prosecution in a criminal trial or asked of a party in a civil trial or required of a department in a disciplinary enquiry.

IV.i.-D. <u>Procedure for enquiry:</u>

52. The conclusion of the competent authority is an estimation at best. The

decision made by inferences drawn from the material in the records, by its very nature can never be proved by mathematical accuracy. However, to obviate possibilities of miscarriage of justice, judicial safeguards have to be built into the decision making process.

53. The law has set its face against an arbitrary denial of appointment to selected candidates. The law stated in ***Mohammed Imran Vs. State of Maharashtra***15, is reproduced below:

"5. Employment opportunities are a scarce commodity in our country. Every advertisement invites a large number of aspirants for limited number of vacancies. But that may not suffice to invoke sympathy for grant of relief where the credentials of the candidate may raise serious questions regarding suitability, irrespective of eligibility. Undoubtedly, judicial service is very different from other services and the yardstick of suitability that may apply to other services, may not be the same for a judicial service. But there cannot be any mechanical or rhetorical incantation of moral turpitude, to deny appointment in judicial service simplicitor. Much will depend on the facts of a case. Every individual deserves an opportunity to improve, learn from the past and move ahead in life by self-improvement. To make past conduct, irrespective of all considerations, an albatross around the neck of the candidate, may not always constitute justice. Much will, however depend on the fact situation of a case.

9....If empanelment creates no right to appointment, equally there can be no arbitrary denial of appointment after empanelment."

54. Emphasizing the need to exercise powers reasonably and objectivity in such matters, the Supreme Court in ***Avtar Singh (supra)*** held thus:

"35...Though a person who has suppressed the material information cannot claim unfettered right for appointment or continuity in service but he has a right not to be dealt with arbitrarily and exercise of power has to be in reasonable manner with objectivity having due regard to facts of cases."

55. The procedural safeguards in an administrative decision making process which has penal consequences shall apply to these proceedings.

56. The authority has to adopt a procedure which is consistent with principles of natural justice.

57. Adverse material has to be provided to the candidate. The candidate can tender his defence to refute the aforesaid material and point out mitigating circumstances in his favour in the proceeding. When need arises fair and an impartial opportunity of hearing may be given to such candidate.

IV.ii. <u>Line of Enquiry by the authorities</u>

58. With the nature of material, evidentiary requirements, and procedural details in place, the line of enquiry to be followed by the authority shall now receive consideration.

59. Consequences of a false declaration made in the course of verification at the time of his recruitment and invalidating effect of criminal cases on the prospects for appointment, were broadly settled in ***Avtar Singh (supra):***

"We have noticed various decisions and tried to explain and reconcile them as far as possible. In view of aforesaid discussion, we summarize our conclusion thus:

(1) Information given to the employer by a candidate as to conviction, acquittal or arrest, or pendency of a criminal case, whether before or after entering into service must be true and there should be no suppression or false mention of required information.

(2) While passing order of termination of services or cancellation of candidature for giving false information, the employer may take notice of special circumstances of the case, if any, while giving such information.

(3) The employer shall take into consideration the Government orders/instructions/rules, applicable to the employee, at the time of taking the decision.

(4) In case there is suppression or false information of involvement in a criminal case where conviction or acquittal had already been recorded before filling of the application/verification form and such fact later comes to knowledge of employer, any of the following recourse appropriate to the case may be adopted: -

(a) In a case trivial in nature in which conviction had been recorded, such as shouting slogans at young age or for a petty offence which if disclosed would not have rendered an incumbent unfit for post in question, the employer may, in its discretion, ignore such suppression of fact or false information by condoning the lapse.

(b) Where conviction has been recorded in case which is not trivial in nature, employer may cancel candidature or terminate services of the employee.

(c) If acquittal had already been recorded in a case involving moral turpitude or offence of heinous/serious nature, on technical ground and it is not a case of clean acquittal, or benefit of reasonable doubt has been given, the employer may consider all relevant facts available as to antecedents, and may take appropriate decision as to the continuance of the employee.

(5) In a case where the employee has made declaration truthfully of a concluded criminal case, the employer still has the right to consider antecedents, and cannot be compelled to appoint the candidate.

(6) In case when fact has been truthfully declared in character verification form regarding pendency of a criminal case of trivial nature, employer, in facts and circumstances of the case, in its discretion may appoint the candidate subject to decision of such case.

(7) In a case of deliberate suppression of fact with respect to multiple pending cases such false information by itself will assume significance and an employer may pass appropriate order cancelling candidature or terminating services as appointment of a person against whom multiple criminal cases were pending may not be proper.

(8) If criminal case was pending but not known to the candidate at the time of filling the form, still it may have adverse impact and the appointing authority would take decision after considering the seriousness of the crime.

(9) In case the employee is confirmed in service, holding Departmental enquiry would be necessary before passing order of termination/removal or dismissal on the ground of suppression or submitting false information in verification form.

(10) For determining suppression or false information attestation/verification form has to be specific, not vague. Only such information which was required to be specifically mentioned has to be disclosed. If information not asked for but is relevant comes to knowledge of the employer the

same can be considered in an objective manner while addressing the question of fitness. However, in such cases action cannot be taken on basis of suppression or submitting false information as to a fact which was not even asked for.

(11) Before a person is held guilty of suppressio veri or suggestio falsi, knowledge of the fact must be attributable to him."

IV.ii.-A. Line of Enquiry- Aggravating Factors

60. Regard has to be paid by the competent authority to the gravity and heinous nature of offences or offences involving moral turpitude. Such cases may dissuade the competent from approving the candidate for appointment.

61. Multiplicity of criminal prosecutions is also a factor while considering the suitability of a candidate. Repetitive criminal acts may reinforce the inference of criminal traits or vice and violence in a candidate.

62. Material in the record should strongly support the inference of criminal traits, or a tendency of involvement in criminal offences, or to directly engage in criminal acts or vice and violence in the conduct. These qualities are not conducive to holding public office. On this foot the authority can justify denial of appointment.

IV.ii-B. Line of Enquiry - Mitigating Factors

63. The line of enquiry shall extend to the consideration of mitigating factors in each case.

64. The authority has to make allowance for mitigating factors in a case. Indiscretions of youth, and fallibility of human nature have to be accorded full weight. Fallibility of human nature is distinct from criminal traits in character. Depraved conduct is not youthful indiscretion. Trivial offences may often occur by human error and not perpetrated by a criminal mindset. Trivial offences may not invite invalidation of candidature. The competent authority has to determine where the threshold lies and draw the line in light of facts of each case.

65. The judgment in ***Commissioner of Police and Ors. Vs. Sandeep Kumar***16, cited with approval in ***Avtar Singh (supra)***, turned on similar facts:

"8. We respectfully agree with the Delhi High Court that the cancellation of his candidature was illegal, but we wish to give our own opinion in the matter. When the incident happened the respondent must have been about 20 years of age. At that age young people often commit indiscretions, and such indiscretions can often be condoned. After all, youth will be youth. They are not expected to behave in as mature a manner as older people. Hence, our approach should be to condone minor indiscretions made by young people rather than to brand them as criminals for the rest of their lives."

66. The authority also cannot neglect the realities of social life and pace of the judicial process and has to consider them in the decision.

67. The practice of falsely framing young members of a family in trivial offences especially in villages is not uncommon. Prosecution in these offences is easily initiated and cases remain pending indefinitely.

68. Tendency to falsely implicate all family members and even distant relatives in many criminal cases arising out of matrimonial disputes has also been noticed by the courts.

69. The employer has to be alert to these realities and factor them in the decision in the facts of a case.

70. Failure to disclose past criminal prosecutions in the affidavit of verification ipso facto will not lead to automatic cancellation of appointment. The authority has to independently consider the consequences of suppression of facts in each case. Equally disclosure of criminal cases by a candidate cannot guarantee appointment. The impact of criminal antecedents on the suitability for appointment has to investigated in the manner consistent with the preceding narrative.

IV (iii). Decision of the authority:-

71. The authority while taking a decision in the matter has to consider relevant facts and material in the record and also the defence tendered by the candidate. The order should be supported by reasons which reflect due application of mind to relevant considerations. A perverse finding or a decision taken on no evidence or an order based on irrelevant considerations will vitiate the decision. Such decision would be vulnerable to judicial interdict.

V. Analysis of Facts & Conclusions:

72. The F.I.R. as well as the judgment of the trial court in Criminal Case No. 5101 of 2017, State Vs. Riyasat and others under Sections 323, 324, 504, 506 I.P.C. were part of the material considered by the authority while arriving at the impugned decision.

73. The prosecution case set out in the F.I.R. identifies the petitioner as the attacker who had severed the right hand fingers of the complainant.

74. Before the learned trial court, the complainant who had turned hostile admitted to the presence of the accused (including the petitioner) at the incident and an altercation with them. The learned trial court opined that the complainant was an injured witness. The complainant too did not deny injuries on his person. For reasons not known, no other person witnessing the crime was called as witness for the prosecution, though mentioned in the chargesheet.

75. Hostile witnesses in certain fact situations may be a circumstance which cannot be ignored by the competent authority. The competent authority in this case was fully justified in attaching weight to the fact of prosecution witnesses turning hostile while assessing the consequences of acquittal.

76. The narrative will be reinforced by another judicial authority, close to the facts of this case. In ***State of Rajasthan and Others Vs. Love Kush Meena***17, while upholding the denial of appointment to a candidate even after acquittal in a criminal case, the role of the co-accused (including the candidate), of attacking the deceased with knives as stated in the prosecution case, was considered in the manner stated below:

"23. Examining the controversy in the present case in the conspectus of the aforesaid legal position, what is important

to note is the fact that the view of this Court has depended on the nature of offence charged and the result of the same. The mere fact of an acquittal would not suffice but rather it would depend on whether it is a clean acquittal based on total absence of evidence or in the criminal jurisprudence requiring the case to be proved beyond reasonable doubt, that parameter having not been met, benefit of doubt has been granted to the accused. No doubt, in that facts of the present case, the person who ran the tractor over the deceased lady was one of the other co-accused but **the role assigned to the others including the respondent herein was not of a mere bystander or being present at site. The attack with knives was alleged against all the other co-accused including the respondent.**

(emphasis supplied)

24. We may also notice this is a clear case where the endeavour was to settle the dispute, albeit not with the job in mind. This is obvious from the recital in the judgment of the Trial Court that the compoundable offences were first compounded during trial but since the offence under Section 302/34IPC could not be compounded, the Trial Court continued and qua those offences the witnesses turned hostile. We are of the view that this can hardly fall under the category of a clean acquittal and the Judge was thus right in using the terminology of benefit of doubt in respect of such acquittal.

25. The judgment in Avtar Singh's case (supra) on the relevant parameter extracted aforesaid clearly stipulates that where in respect of a heinous or serious nature of crime the acquittal is based on a benefit of reasonable doubt, that cannot make the candidate eligible."

77. The determination so made in **Love Kush Meena (supra)** reflects the recognizable principles disclosed in the preceding part of this narrative.

78. In the facts of this case, the acquittal of the petitioner cannot be held to be honourable. Further the crime was of a heinous nature. The manner of consideration of the aforesaid material by the competent authority in the impugned is lawful and the conclusions are reasonable.

79. Material furnished by the above said case alone was sufficient to support the finding of the competent authority regarding the non-suitability of the petitioner for appointment.

80. However, it was not an isolated case. The competent authority also noticed the second case against the petitioner which was registered as Case Crime No. 150 of 2013, under Sections 307 and 506 I.P.C. The petitioner was nominated as an accused in the F.I.R. and a specific role was attributed to him in commission of the crime. Chargesheet under Section 506 I.P.C. submitted against the petitioner, and the fact of the trial being underway were also considered before passing the impugned order.

81. Both the criminal cases were in no way connected with each other. Criminal cases were instituted by different parties for separate offences. Multiplicity of cases manifested repetitive criminal conduct and thus assumed significance.

82. The competent authority cannot be faulted for finding that the aforesaid antecedents revealed traits which made the petitioner unsuitable for appointment.

83. The impact of the subsequent event of the acquittal of the petitioner in Criminal Case No. 7410 of 2014, State Vs. Babbu Khan and others, under Section 506 I.P.C., by the judgment rendered by the learned trial court on 07.02.2020 shall be considered.

84. The learned trial court in the judgment dated 07.02.2020 found that some prosecution witnesses had testified to the role of the petitioner in the criminal offence. This was consistent with the prosecution case in the F.I.R. However, in view of the contrary depositions by other witnesses, the peittioner was found entitled to the benefit of doubt. Accordingly, the learned trial court acquitted the accused (petitioner) by granting him benefit of the doubt. ["अतः अभियुक्त संदेह का लाभ पाने का अधिकारी है एवं दोषमुक्त किये जाने योग्य है।"]

85. The acquittal of the petitioner was clearly not honourable.

86. The aforesaid acquittal hence is of no avail to the petitioner in the facts of the case. The multiplicity of criminal cases as seen earlier constitute aggravating circumstances which compelled the competent authority to find against the petitioner. The acquittal by the trial court in the second case does not warrant any fresh consideration of the controversy by the authority.

87. In the opinion of the competent authority the multiple criminal cases yielded material of credible nature with high probative value. The order of the competent authority based on the said material is supported by reasons. The impugned order factors relevant criteria and excludes irrelevant considerations. The inferences drawn by the authority are reasonable. The impugned order is in conformity with judicial authorities in point. There is no procedural impropriety committed by the authority while passing the impugned order.

88. The pleadings in the writ petition and the material in the record before this Court, do not establish any perversity in the findings. In these facts, disclosure of the criminal cases by the petitioner is not a defence against cancellation of his selection.

89. In wake of the preceding discussion, the impugned order dated 01.06.2019 passed by respondent no. 4-Superintendent of Police/Nodal Officer, District Recruitment Board, Rampur, is not liable to be interfered with.

90. The writ petition is liable to be dismissed and is dismissed.
